SUPREME COURT OF THE UNITED STATES.

No. 178.

MARY R. MONTGOMERY, BY ROSELLA MONTGOMERY, HER TUTRIX, NEXT FRIEND, AND GUARDIAN, PLAINTIFF IN ERROR,

VS.

HENRY SAMORY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

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1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

MARY ROSELLA MONTGOMERY
vs.
HENRY SAMORY.
} No. 6399.

Petition and order thereon.—Filed March 29th, 1871.

To the honorable the judges of the United States circuit court for the fifth circuit and district of Louisiana:

The petition of Mary Rosella Montgomery, a minor of the age of six years, suing herein by her next friend and guardian and natural tutrix M'r's Rosella Montgomery, her mother, duly recognized and qualified as tutrix of the said minor, by the second district court of New Orleans, in the year 1866, both of whom are citizens of the United States, born in the United States and residents and citizens of the State of Mississippi, respectfully represents:

That Henry Samory, the defendant, is a citizen of the State of Louisiana, and resided in New Orleans during the year' 1863 and
2 1864. That Samuel McCutchon Montgomery, the father of petitioner, was married prior to the year 1863 to Rosella Tournillon, and that the said Samuel McC. Montgomery died in New Orleans, in the year 1866, intestate, leaving petitioner, the sole issue of the said marriage, his only heir.

Petitioner further shows that her said father resided in the city of New Orleans for many years prior to the year 1861, that in that year he engaged in the rebellion against the United States Government, joined a military organization known as the "Louisiana Guards," in hostility to the United States, accompanied the said military body to the State of Virginia, and from the date aforesaid until the month of June, 1865, remained in that portion of the Confederate States declared by the proclamation of the President of the United States to be in rebellion against the government and authority of the United States.

Petitioner further alleges that the said Samuel McC. Montgomery was at the time of his death the true and lawful owner of the following-described property, to wit, the lot of ground with the buildings
3 and improvements thereon, in the square bounded by Camp, Gravier st., Charles and Common streets, in New Orleans, being the lot No. 25 Camp street and the northwest corner of Camp and Common streets, having 23 feet 6 inches front on Camp street, by a depth and front on Common of about 54 feet. The said lot comprising the whole of lot No. one on a plan by L. E. Reynolds, described on plan No. 171 in the book of plans of Theodore Guyol, late notary public, acquired by act of partition with his co-heir Hugh W. Montgomery passed before Guyol, notary, Dec'r 16th, 1859. And also, all that part of an alley embraced within the extension of the side-line of the said lot No. one, back to the line of lot No. two on said plan, acquired by the said Samuel McC. Montgomery by public act of agreement between Hugh W. Montgomery, M'r's W. F. Krumbaar, W. H. Montgomery, and the said Samuel, before the said notary Guyol, on the 7th of February, 1861, which said property was acquired by the said Samuel McC. and Hugh W. Montgomery, by his

inheritance from their father Robert R. Montgomery; copies of the
said acts will be annexed hereto as part of this petition; the prop-
4 erty above-described is the same which was purchased at sheriff's
sale in New Orleans on the 5th of February, 1864, by Henry
Sanory, and which was sold under an execution or order of sale issued upon a judgment rendered by the first district court of New Orleans in suit No. 17501 of the docket of said court, entitled Henry Samory vs. Samuel McCutcheon Montgomery, and all which the above-described property descended to petitioner as heir at law of her father.

Petitioner avers, that about the day of December, 1863, at the time when her father was in a portion of the so called Confederate States declared to be in hostility to and in rebellion against the United States, and at a time when all intercourse, and especially all commercial intercourse between the belligerents, the United States and the so-called Confederate States, was forbidden by the proclamations of the President of the United Sates issued by authority of law, the said suit No. 17501 was instituted by the said Samory against the said Samuel McC. Montgomery, to subject the said property to sale to satisfy certain claims
alleged to have been there held by said Samory.

5 Petitioner avers that no personal service was made upon the
said Samuel of the citation which issued in said suit, but the same was served upon a curator ad hoc appointed by the court to represent and correspond with the defendant.

And after certain proceedings judgment was had and rendered against defendant Montgomery, the property above described was sold under execution or order of sale which issued on said judgment by the sheriff on the 5th of February, 1864, and was bought by Henry Samory, the plaintiff, in execution, at the price of $14,000, which he retained in his hands in satisfaction of the illegal judgment which he had obtained against the said Montgomery, and the said Samory has been in possession of the said property since February 5th, 1864, and still remains in possession.

Petitioner alleges that the said Samuel McC. Montgomery was never legally cited in the said suit and legal proceedings, by virtue of which his property was sold; that no notice of seizure of the property was
ever given him; that the appointment of a curator to represent
6 the absent defendant, who was in a portion of the Confederate
States declared at that time to be in rebellion, in a suit pending in a court of the then loyal city of New Orleans, was in direct violation of the authority of the United States and the proclamation of the President; that the judgment thus rendered in the absence of any citation was an absolute nullity, and the sale made under such a judgment conferred no title or right upon the defendant Samory, who knew of the absence within the rebel lines of the said Montgomery.

Petitioner avers that the said property is of the value of fifty thousand dollars; that the annual rent and value of said property is $4,800, or $400 per month, which the said Samory has received and enjoyed since the date of his purchase aforesaid.

Wherefore petitioner prays that Henry Samory be cited to answer this petition; that this honorable court will adjudge and decree that she is the true and lawful owner of the said property above described, and that the title to the said property acquired by Henry Samory by the pur-
chase aforesaid is null and void.

7 And further, plaintiff reserves the right to sue for and claim
the annual value and rents and profits of the said premises from

the 5th of February, 1864, less such legal charges and credits as the defendant may show himself entitled to, and she prays for general relief.

(Signed) THO'S HUNTON,
Att'y for Pl'ff.

The minor, Mary R. Montgomery, is authorized to prosecute this suit by her mother, Mary Rosella Montgomery, as her next friend and guardian ad lit*um*.

April 29th, 1871.
(Signed) E. H. DURELL, *Judge.*

Citation.—Issued March 29th, 1871.

MARY ROSELLA MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

You are hereby commanded to summon Henry Samory, a citizen of the State of Louisiana, to comply with the demand of Mary Rosella
8 Montgomery, a minor, through her mother and natural tutrix, M'r's Rosella Montgomery, citizen of the State of Mississippi, contained in the petition, of which a copy accompanies this citation, or to deliver his answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held.

And that you make due return hereof on the first Monday of May, 1871.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 29th day of March, A. D. one thousand eight hundred and seventy-one, and of the Independence of the United States of America the 95th year.

[SEAL.] (Signed D. URBAN, *Clerk,*
By F. B. VINOT,
D'y Clerk.

Marshal's return.

9 Received March 30th, 1871, by the U. S. marshal, and on the 3d day of April, 1871, served a copy of the within citation and accompanying petition on the within-named Henry Samory, by delivering the same to Claude Samory, his agent and attorney in fact, in person, at No. 45 Old Levee street, in this city, the said Henry Samory being absent from the district of Louisiana at the time of the service hereof, all of which I learned by interrogating the said Claude Samory.

New Orleans, April 3d, 1871.
(Signed) S. W. REED,
D'y U. S. Marshal.

Exception.—Filed April 13th, 1871.

U. S. circuit court.

MARY ROSELLA MONTGOMERY, BY M'R'S R. Montgomery, tutrix, &c.,
vs.
HENRY SAMORY.
} No. 6399.

Henry Samory, a citizen of the State of Louisiana, residing in New Orleans, cited as defendant in the above-styled cause, now comes into court, and for exception to the jurisdiction of the court pleads that the plaintiffs herein are citizens of the State of Louisiana, and not, as
10 is by them in their petition pretended, citizens of the State of Mississippi.

Wherefore defendant prays judgment in his favor sustaining his said exception to the jurisdiction of the court, and that the plaintiffs' said petition be dismissed at their cost, and for such further relief as equity, law, and the nature of the case may require.

And he will ever pray.

(Signed) RANDALL HUNT,
Do. E. FILLEUL,
Of Counsel.

Claude Samory, of this city, being duly sworn, says that he is the duly-authorized agent of Henry Samory, who is now temporarily absent from the State; that all the facts and allegations contained in the foregoing exception are true and correct; and that the plaintiffs are citizens of the State of Louisiana, and are not citizens of the State of Mississippi.

(Signed) C. SAMORY.

Sworn to and subscribed before me this 13th day of April, 1871.

(Signed) F. B. VINOT,
D'y Cl'k.

Waiver of jury.—Filed May 31st, 1871.

11 U. S. circuit court.

MONTGOMERY
vs.
SAMORY.

We waive trial by jury of the exception to jurisdiction in this case.

(Signed) THO'S HUNTON,
Att'y for Pl'ff.

(Signed) E. FILLEUL, *for self*, and
R. HUNT, *of Counsel.*

N. O., May 31st, 1871.

Submission of exception.—Extract from the minutes, April term, 1871.

NEW ORLEANS, *Wednesday, May 31st*, 1871.

Court met pursuant to adjournment.

Present, Hon. E. H. Durell, district judge.

MARY R. MONTGOMERY
vs.
HENRY SAMORY.
} No. 6399.

The exception to the jurisdiction was called up, the counsel having waived in writing a trial by jury.

Present, Thomas Hunton for plaintiff; E. Filleul and R. Hunton for defendant.

When, after hearing the pleadings, evidence, and counsel, the court took time to advise, and allowed 10 days to furnish printed briefs.

12 *Order, exception overruled.—Extract from the minutes, November term*, 1871.

New Orleans, *Friday, December 8th*, 1871.

Court met pursuant to adjournment.

Present, Hon. E. H. Durell, district judge.

Mary R. Montgomery }
vs. } No. 6399.
Henry Samory. }

For reasons orally assigned, it is ordered that the exception to the jurisdiction of the court be overruled with costs.

Answer.—Filed December 15th, 1871.

To the honorable the judges of the United States circuit court for the fifth circuit and district of Louisiana:

The answer of Henry Samory, of this city, respectfully shows that your respondent denies all and singular the facts and allegations contained in the pl'ff's petition. He respectfully denies that the pl'ff has inherited the succession of Samuel McCutcheon Montgomery, and is able to exercise any rights of action belonging to the said succession, and he alleges
13 that the said succession is now in due course of administration in the second district court for the parish of Orleans, No. 26945 of the docket of said court, and according to the law of Louisiana the minor heirs, accepting only under a benefit of inventory, are only entitled to the residuary interest after payment of the debts and a full and complete administration, and after having been put in possession by the probate court.

That the proceedings of the plaintiff's before the court are in violation of the judiciary act of September 24th, 1789, a final judgment having been rendered on the same subject-matter between the same parties by the highest tribunal of the State of Lousiana, which final judgment cannot be enquired into and reversed by the Supreme Court of the United States; that this case has been finally decided between the same parties in the case No. 17501 of the third district court for the parish of Orleans and confirmed by the supreme court of Louisiana in the case No. 700 of the docket of the said court, which judgment in favor of your respond-
14 ent entitle him to the pleas of res judicata as to all matters and pleas passed upon in the said judgment.

That Montgomery, the father of pl'ff, under whom she claims, was not entitled to the benefits of the act of Congress suspending all relations between parties in the Union lines and parties in the Confederate lines, because he was not driven away from New Orleans, and was not prevented from returning to said city, but voluntarily left the city of New Orleans, his residence and domicile, to join and aid the rebellion against the Government of the United States; therefore the proceedings instituted against him and the judgment obtained against him during his absence aforesaid were legal and authorized.

That the subject-matter of this suit is property situated in New Orleans, seized and sold in rem on an act of mortgage executed in New Orleans between parties residing and domiciliated in New Orleans; that the pl'ff claims as heir of her father, whose domicil was in New
15 Orleans and who died in New Orleans, whose succession was opened
and is now in due course of administration in New Orleans under the jurisdiction and authority of the probate court of New Orleans, and that court is without jurisdiction.

That there are debts due by the succession of Montgomery, and until said debts are paid and settled and the administration wound up by a judgment of the probate court the pl'ff has no right to stand in judgment, the right to sue for and to represent the succession being exclusively vested in the administrator of the succession appointed by the court.

That an heir cannot institute any action which his ancestor could not have instituted.

That Samuel McCutcheon Montgomery by appealing to the supreme court in the suit No. 700 of the docket of said court bound himself by the fact of his appeal to acquiesce in the judgment of the supreme court of Louisiana.

That the tutrix of the pl'ff by making herself a party to the said appeal is irrevocably bound by the decision of the supreme court of Louisiana.

16 And further answering, your respondent says that he was the bona fide creditor of Samuel McCutcheon Montgomery for the sum of $15,640, with interest; that they were both domiciliated in New Orleans and were citizens of Louisiana; that to secure the said debt Samuel McCutcheon Montgomery granted a mortgage on his property situate in New Orleans and described in the pl'ff's petition.

That the act of mortgage contained, as is authorized by the laws of Louisiana, a confession of judgment by Montgomery for said sum of $15,640, interest and costs, and the consent of Montgomery that in case of non-payment at maturity of said sum of $15,640 the property mortgaged to secure the same should be sold by executory process, without appraisement, at any price and to the highest bidder.

That at maturity of the notes given by Montgomery for said sum of $15,640 they were not paid and were protested; that the payment was extended and at the expiration of said extension granted the said notes were not paid.

17 That both Montgomery and Samory were residents and citizens of New Orleans; that the claim of Samory was for a debt contracted in New Orleans, secured by mortgage on property situated in New Orleans; that Montgomery being absent from New Orleans, Samory was authorized by the laws of Louisiana, by the confession of judgment of Montgomery, and by his consent given in the act of mortgage that in case of non payment of his notes at maturity the property mortgaged to secure the same be sold by executory process and without appraisement, to institute suit against him in the 3rd district court of New Orleans, said court being of competent jurisdiction to cause the said Montgomery to be represented by a curator ad hoc, and to obtain judgment or an order of seizure and sale of the property mortgaged to secure his claim against the said Montgomery, all of which proceedings are strictly in accordance with the law of Louisiana, were legal and regular as decreed by judgment of the supreme court of Louisiana, the highest court of last resort of the State, which judgment was rendered on an appeal taken by said Montgomery in person.

18 That by virtue of the said judgment against Montgomery, who was duly cited, represented, and defended according to the laws of Louisiana by a curator ad hoc, the property of Montgomery claimed by the pl'ff as his heir was legally and regularly seized and sold to satisfy Samory's mortgage, claim interest and costs *and* on the same, which amounted to $18,329.71.

That though the said property could have been sold for cash and to the highest bidder without appraisement, in accordance with the terms of the act of mortgage as aforesaid, said property was duly appraised by appraisers selected by both parties, and the same valued at $20,000.00 cash, as appears by a duly-certified copy of said appraisement, which shows that the assertion in pl'ff's petition that the value of said property was $50,000 is erroneous and exagerated.

That, according to the laws of Louisiana in cases where appraisement is not waived, property sold in execution, to be sold, must bring two-thirds of the appraised value. That at the sheriff's sale of said property of Montgomery, Samory, being the last and highest bidder, purchased the same for $14,000.00, which sum is more than $\frac{2}{3}$ of the appraised value. 19

That the nett proceeds of the sheriff's sale of the said property was $11,327.11, which was imputed and deducted from the mortgage claim of Samory, amounting on the day of sale, in principal and interest, to $18,329.11, leaving a balance due by Montgomery to Samory of ($7,002.60) seven thousand and two dollars and 60 cents, with interest at 8 % per annum from February 5th, 1864.

That, according to the laws of Louisiana, Samory caused to be published monitions to perfect his title to said property, which monitions, no opposition having been made, were duly homologated, and a judgment of homologation of said monitions was duly rendered, and made said sheriff's sale of said property to H. Samory complete and perfect, and a bar to any action which might be instituted to contest its validity.

That the title of Samory to the property claimed by the pl'ff, representing herself as heir of Montgomery, is good, legal, valid, indisputable, being held by virtue of a final and definitive judgment of the supreme court of Louisiana, rendered on an appeal taken by Montgomery in person, to which appeal after his death his heir, the pl'ff in this case, on her own application, was made a party. 20

That Samory cannot be disturbed in the ownership and possession of property situated in Louisiana, held under a legal and lawful title by the laws of Louisiana, decreed to be such by the supreme court of Louisiana, the highest court of last resort in the State, and the only court having the right and power to pronounce on the validity of such a title.

That even if the heir of Montgomery has a right to claim the said property, which is specially denied, she cannot do so without tendering the payment of the mortgage debt which was due to Samory on said property when he purchased the same at the sheriff's sale to satisfy his first-mortgage claim of $15,640.00, with the taxes, costs, lawyers' fees, and amounting to $2,672$\frac{83}{100}$, and interest at 8 % per annum from date of maturity of notes, which tender of payment was never made by the said pl'ff.

21 That, contrary to your respondent's defense, should it be decreed that the title of Samory to said property is null and void,

That said Samory claims that, being a purchaser at a public judicial sale, he is owner in good faith and by virtue of a just title translative of ownership, and that by the laws of Louisiana he is not bound to restore the fruits of the property which accrued before the judicial demand of the pl'ff; that he is also protected by the prescription of three years against all demands for rent claimed by the pl'ff, and in such a case he claims in reconvention and in compensation the amount of his mortgage claim on said property, say $15,640, with interest at 8 % per annum from maturity of notes till paid, all taxes, repairs, lawyers' fees, costs of court, and all other expenses which he has paid for or on account of said property, and prays that judgment for the same may be rendered in his favor.

That Samory denies specially that the property claimed by the plaintiff was of the value of $50,000.00 as alleged at the time it was sold 22 by the sheriff and bought by him, and he also specially denies that the property yielded the large rents alleged in the plaintiff's petition.

That since the filing of the exceptions to the jurisdiction of this court, based upon the domicile and citizenship of widow Montgomery and her ward, she has returned to her original domicile, in New Orleans, and has petitioned for and accepted a public office and function, to wit, that of administratrix of the succession of Samuel McCutcheon Montgomery, by appointment of the second district court of New Orleans, an office which renders her amenable to the jurisdiction of the second district court of New Orleans, requires her personal attendance, and fixes her domicile within the jurisdiction of the said court where she exercises her said functions.

That exercising the duties of two distinct civil and public offices in New Orleans, under appointment of the second district court for the parish of Orleans, and within the jurisdiction of the said probate court, to wit, tutrix of her minor child, the plaintiff, and administratrix of the succession of her husband, she is in her said official capacities completely under the exclusive power, control, & authority of the 23 second district court of New Orleans, and is bound to obey the orders of the said court of whom she is but an agent or officer.

That she has been enjoined by the said second district court from interfering individually and as tutrix in the administration of the succession of Samuel McCutcheon Montgomery, and from disposing of or jeopardizing or exercising any rights of action which belong to the succession of S. McCutcheon Montgomery, and commanded to discontinue the present suit based upon rights of action, which are inventoried in the succession of Montgomery and valued by her at one thousand dollars, and which have been delivered by the probate court to her keeping in her capacity as administratrix, and for which she has given bond to the second district court, coupled with the obligation to account for and administer on the same under the supervision and control of the probate court.

That, in her capacity of tutrix, she can possess herself of nothing belonging to the succession of Montgomery except the liquidated residuary interest which shall be found to exist after a complete admin- 24 istration and liquidation of the estate, and if any such residuary interest be found to exist, she must pray the court of probate for an order placing her as tutrix in possession of the same, reserving the rights of any and all creditors of said succession to oppose her said application.

Wherefore your respondent prays that the plaintiff's petition be dismissed with costs, and that judgment be rendered in his favor with costs.

And your respondent also prays for general relief.

And as in duty bound, &c.

(Signed) R. HUNT,
(Do.) E. FILLEUIL,
Of Counsel.

Peremptory exception filed January 22d, 1873.

Circuit court of the United States, fifth circuit and district of Louisiana.

M'R'S ROSELLA MONTGOMERY, TUTRIX, &C.
vs. No. 6399.
HENRY SAMORY.

The defendant, Henry Samory, now comes into court and to the plaintiff's demand files the following peremptory exceptions:

1st. The plaintiff's petition shows no cause of action.

25 2d. The tutrix of a minor, representing a benficiary heir, cannot stand in judgment for a succession which is in course of administration in the probate court and has not been accepted purely and simply.

3rd. A petitory action can only be brought by one having the legal title, or his legal representatives. The administrator of a deceased vendor, whose vendee does not complain, cannot sue the party in possession.

4th. That the title set up by the plaintiff having been divested by the sheriff's sale in the case No. 17501 of the 3rd district court, entitled H. Samory vs. S. M. Montgomery, the plaintiff's father, from whom she derives her alleged title, she is estopped from setting up the same title against the purchaser at said sale, whom she is bound to protect and warrant.

5th. That this court cannot entertain any suit to annull a judgment of the third district court for the parish of Orleans affirmed on appeal by the supreme court of Louisiana; that such a judgment cannot be attacked or annulled incidentally or collaterally. An action to annull a judgment can only be brought before the court which has rendered the same, for the causes set forth, and in the manner and form provided for by the articles of the Code of Practice (604 to 614). 26

6th. The defendant pleads res judicata the thing demanded is the same; the demand is between the same parties, founded on the same cause of action, and formed by them against each other in the same quality, and was adjudicated upon, as it appears by the judgment in record No. 17501 of the third district court entitled H. Samory vs. S. M. Montgomery, affirmed in the supreme court, in record No. 700 of said court.

7th. That the judgment of the third district court rendered on the 9th June, 1864, upon a monition, and confirming and homologating the sale made to H. Samory, operates as a complete bar against all persons, whether of age or not, and is full and conclusive proof that the sale was duly made according to law.

8th. And defendant also pleads the prescription of five years in bar of the plaintiff's action.

Wherefore the defendant prays that these his peremptory exceptions be maintained and that the plaintiff's suit be dismissed with costs, and for general relief.

27 (Signed) E. FILLEUL,
For Def't, and
RANDELL HUNT,
Of Counsel.

Henry Samory, being duly sworn, says that all the foregoing exceptions and pleas in bar are true and correct, and all the facts upon which said exceptions and pleas in bar are founded are true and correct.

(Signed) HENRY SAMORY.

Sworn to and subscribed before me this 20th Jan'y, 1873.

(Signed) F. B. VINOT,
U. S. Comm'r.

Waiver of jury.—Filed March 20th, 1873.

U. S. circuit court.

MONTGOMERY
vs. } No. 6399.
SAMORY.

We waive a trial by jury in this case and consent that the case be tried by the court; the court to find the facts.

New Orleans, March 20th, 1873.

(Signed) THO'S HUNTON,
For Plaintiff.

(Signed) E. FILLEUL.

Hearing, submission, and order.—Extract from the minutes November term, 1872.

28 NEW ORLEANS, *Thursday, March 20th*, 1873.

Court met pursuant to adjournment.

Present, Hon. W. P. Woods, circuit judge.

M. R. MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

This cause was called for trial before the court, the parties having filed a stipulation waiving the jury.

Thomas Hunton for plaintiff; Randell Hunt and E. Filleul for def't.

When, after hearing the pleadings, evidence, and argument, the court took time to advise, and requested counsel to furnish their authorities.

Motion and order.—Case reassigned for further argument.—Extract from minutes of March 21st, 1873.

MARY R. MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

By consent of counsel, and with the permission of the court, the cause is assigned for further argument on Wednesday, 26th instant, at 11 a. m.

Hearing and submission of case.—Extract from minutes of March 28th, 1873.

MARY R. MONTGOMERY
versus
29 HENRY SAMORY. } No. 6399.

This cause was resumed, and after hearing the closing arguemnt of Tho's Hunton, esq., the court took time to consider, and requested counsel to furnish their authorities in print.

Judgment.—Extract from the minutes, April term, 1873.

NEW ORLEANS, *Wednesday, June 18th*, 1873.

Court met pursuant to adjournment.
Present, Hon. E. H. Durell, district judge.

MARY ROSELLA MONTGOMERY
vs.
HENRY SAMORY. } No. 6399.

Judgment is rendered in this case against the defendant and in favor of the minor, Mary Rosella Montgomery, as prayed for. And it is ordered, adjudged, and decreed that the title to the property mentioned in the petition acquired by Henry Samory, the defendant, by purchase at the sheriff's sale made in New Orleans on the 5th of February, 1864, under an execution which issued on the judgment rendered in the suit No. 17501, of the third district court of New Orleans, is null and void.

30 It is further adjudged and decreed that the minor, Mary Rosella Montgomery, is the lawful owner of the said property, viz: The lot of ground, with the buildings and improvements thereon, in the square bounded by Camp, Gravier, S't Charles, and Common streets, in New Orleans, known as No. 25 Camp street, having 23 feet 6 inches front on Camp street by a depth and front on Common street of about 54 feet, and forming the southwest corner of Camp and Common streets.

It is further adjudged and decreed that the plaintiff's rights to claim and sue for the value of the annual rents and profits of the said premises, from the 5th of February, 1864, is reserved to the plaintiff.

And it is further adjudged and decreed that defendant, Samory, may retain in his possession all notes of the defendant, Samuel McCutcheon Montgomery, and all mortgages on said property which he may have had at the date of the institution of his suit against said Montgomery, No. 17501 of the third district court of New Orleans.

It is further adjudged that defendant pay the costs of this suit.

31 *Order as to statement of facts.—Extract from the minutes of June 20th,* 1873.

MARY R. MONTGOMERY
vs.
HENRY SAMORY. } No. 6399.

On the state of facts submitted, the court reserves its action till the next term.

Rule for a new trial filed, and extract from the minutes of June 20th, 1873.

MARY R. MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

On motion of R. Hunt and E. Filleul, of counsel for defendant, it is ordered that the plaintiff show cause, on the 3rd November, 1873, at 11 o'clock a. m., why a new trial should not be granted in this case, on the following grounds, to wit:

1st. The judgment is contrary to law and evidence.

2d. The court is without jurisdiction ratione personæ and ratione materiæ.

3rd. The tutrix of a minor beneficiary heir of a succession in course of administration in the probate court cannot represent the succession and stand in judgment.

32 4th. A petitory action can only be brought by one having the legal title, or his legal representative. The title set up by the plaintiff having been divested by the sheriff's sale in the case of No. 17501 of the 3rd district court of New Orleans, entitled H. Samory vs. S. McC. Montgomery, the plaintiff's father, from whom she pretends to derive title, she is estopped from setting up the same title against the purchaser at said sale.

5th. That the judgment of the third district court on the monition issued in the above proceedings, rendered on the 9th of June, 1864, confirming and homologating the sale made to H. Samory, operates as res judicata, and is a complete bar against all persons, whether of age or not, and is full and conclusive proof that the sale was duly made according to law.

6th. That the judgment of the supreme court of Louisiana on the appeal in the case of H. Samory vs. Montgomery, No. 17501, of the 3rd district court, is final and conclusive. and sustains the plea of res judicata; that the plea of res judicata made twice, and based upon 33 two definitive judgments from the State courts, should have been sustained, and the decisions of the State courts on the validity of the sale and proceedings should have been maintained, the State courts being sole and exclusive judges in all matters connected with the execution of their judgments.

7th. That the prescription of five years against the action of nullity of any public and judicial sales should have been sustained.

8th. That the court erred in decreeing that the suit of Samory vs. Montgomery, No. 17501, of the 3rd district court, and affirmed to the supreme court, 19 A. R. 333, was a personal action, the supreme court of the State having decreed that it was an action in rem, an hypothecary action to have the property mortgaged sold to satisfy the mortgage debt.

9th. That a mortgage creditor is in possession of the property mortgaged to him, and the institution of the hypothecary action ipso facto dispossesses the mortgage debtor.

10th. That the judgment of the court is rendered on a plea not made by the plaintiff and not contained in her petition.

11th. And upon such other grounds as may be argued upon
34 the trial of this motion.

Statement of facts.—Filed October 7th, 1873.

U. S. circuit court, dist. of L'a.

MARY ROSELLA MONTGOMERY }
vs. } No. 6399.
HENRY SAMORY. }

Trial by jury in this case having been waived by agreement in writing, signed by counsel for plaintiff and defendant, and the case submitted to the court, the court finds the following facts as proved:

1st. That during the summer of 1861, Samuel McCutcheon Montgomery, the father of plaintiff, entered into the military service of the Confederate States, and remained in that service, absent from New Orleans, his domicil, until May, 1865, and was during that time beyond the lines of occupation of the military forces of the United States.

2d. That during the period aforesaid, and after the promulgation of the proclamation of President Lincoln of December, 1863, the said Montgomery, being in the military service of the Confederate 35 States, was not permitted to return to his residence in New Orleans, and could not have done so without subjecting himself to arrest and punishment by the Confederate authorities.

3rd. That prior to June, 1867, the said Montgomery died intestate, leaving as his sole heir the minor Mary R. Montgomery, the plaintiff, of whom her mother is guardian and tutrix.

4th. That up to the date of the sale made by the sheriff, under the judgment of the third district court of New Orleans, to wit, on the day of February, 1864, at which the defendant, Samory, purchased the property in the petition mentioned, the said Montgomery was the true and lawful owner of the property in the petition of plaintiff described.

5th. That the title of Montgomery was not divested by the said sale made under the judgment rendered in suit No. 17501, of the third district court of New Orleans, under which the defendant, Samory, claims said property; that the sheriff who made the sale never took possession of the property under the writs of execution, did not make a valid seizure thereof, nor did he record in the mortgage office the 36 seizure as required in the absence of an actual seizure and possession of property taken under a writ of execution.

6th. That the property claimed by plaintiff is worth from forty to fifty thousand dollars, and that the property rents for $5,000 per annum.

7th. That after Montgomery's return to New Orleans, in 1865, he offered to pay to defendant, Samory, the whole of the mortgage debt which Samory had held against the property, principal and interest, costs and charges, in gold, if he, Samory, would reconvey to him, which offer Samory declined. That at the time this offer was made Montgomery did not have the gold with him, but said he would pay it if Samory would accept the offer.

8th. That the plaintiff and her mother and guardian were citizens of the State of Mississippi at the time this suit was instituted, and the defendant was a citizen of the State of Louisiana.

(Signed) E. H. DURELL, *Judge.*

37 *Opening and continuance of rule.—Extract from the minutes, November term,* 1874.

NEW ORLEANS, *Friday, March 27th,* 1874.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.
" " E. H. Durell, district "

MARY R. MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

The rule for a new trial was called.
R. Hunt and E. Filleul for relator.
Tho's Hunton for defendant in rule.
When the argument was opened by M'r Filleul for the relator and continued till to-morrow at 11 a. m.

Submission of rule for a new trial.—Extract from the minutes of March 28th, 1874.

MARY R. MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

The rule for a new trial was called.
Thomas Hunton, for pl'ff.
E. Filleul, for def'd't.
And after hearing the argument the court took time to advise the parties to file briefs within two weeks.

38 *Order, new trial granted.—Extract from the minutes, April term,* 1874.

NEW ORLEANS, *Friday, June 12th,* 1874.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.
" " E. H. Durell, district judge.

MARY R. MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

For reasons orally assigned, it is ordered that the rule herein taken by def'd't on 20th June, 1873, be made absolute; that the judgment rendered on the 18th June, 1873, be set aside, and that a new trial be granted in the premises.

Supplemental and amended petition and order.—Filed January 29th, 1875

United States circuit court.

MONTGOMERY
vs. } No. 6399.
SAMORY.

To the honorable the judges of the circuit court of the United States for the fifth circuit and district of Louisiana:

This amended and supplement' petition of plaintiff, filed by leave of

the court, respectfully shows, that she has been informed, and so
39 alleges the fact to be, that at the date of the judgment of the
third district court of New Orleans, in the suit No. 17501 of the docket of that court, entitled Henry Samory vs. Samuel McCutcheon Montgomery, and at the date of the sale of S. McC. Montgomery's property under the execution which issued on said judgment and continuously between those dates, the said property, being the same the title to which is sought to be annulled in the suit, was in possession of the United States and under their control, the government having taken possession of the same as abandoned property.

And plaintiff alleges that the sheriff could not legally seize, take possession of, or sell the said property under the said writ of execution, and alleges that there never was a valid or legal seizure of the said property made in the said case or under the writ which issued therein, and that the said sale was a nullity, and confessed no title on the defendant.

Wherefore plaintiff prays that defendant be cited to answer this amended petition, and for judgment declaring the title of defendant to said property null and void, and decreeing petitioner to be the
40 owner thereof, and for such other and further relief as she is entitled to.

(Signed) THOMAS HUNTON,
Att'y for Plaintiff.

Let the within amended and supplemental petition be filed.
New Orleans, January 29th, 1875.
(Signed) W. B. WOODS, *Judge.*

Exception to plaintiff's supplemental and amended petition.—Filed February 24th, 1875.

United States circuit court, 5th circuit & district of La.

Mary Rosella Montgomery
vs. } No. 6399.
Henry Samory.

The defendant comes into court, and as a peremptory exception to the supplemetal and amended petition filed by the plaintiff on the 29th January, 1875, says that the supplemental and amended petition changes entirely the cause of action and the demand set forth in the original petition of March 29th, 1871. It alters the plaintiff's pleadings and the basis and the foundation of the suit instituted in the original petition. It is vague and general, without any clear, full, and precise statement with certainty to apprise the defendant of what is necessary to
41 put him on his defense. It changes the substance of the demand, the ground of the claim and the defense.

Your respondent therefore prays that the said supplemental and amended petition be stricken from the record and dismissed with costs, and for general relief.

And as in duty bound, &c.

(Signed) RANDELL HUNT,
Of Counsel for Def't,
p. ROB'T G. DUGUE.

Order, exception to supplemental and amended petition overruled.—Extract from the minutes of March 22d, 1875.

ROSELLA MONTGOMERY }
vs. } No. 6399.
HENRY SAMORY. }

The exception to plaintiff's supplemental petition came on to be heard.

Randell and Carleton Hunt for exceptor.

Thomas Hunton, for plaintiff, submitting his points in writing.

And after hearing the pleadings and argument, it is ordered that the exception be overruled and that the supplemental and amended petition be allowed to stand.

42 *Exception and answer to supplemental and amended petition.—Filed March 25th, 1875.*

U. S. circuit c't.

MONTGOMERY }
vs. } No. 6399.
SAMORY. }

Now comes into court Henry Samory, defendant in the above-styled cause, and to the plaintiff's supplemental and amended petition therein filed pleads the following exceptions:

First. That the said petition sets forth no cause of action.

Second. That the cause and ground of action set up in the said supplemental and amended petition is prescribed under articles 3543, 3544 of the revised civil code of L'a by the prescription of five years under said articles 3543 and by the prescription of ten years under said article 3544.

Third. That all and several the exceptions pleaded to the original petition in this case are valid and sufficient in law as a bar to the supplemental petition, and are again pleaded to the supplemental petition and made part of the present exceptions.

And this defendant, not waiving any portion of the exceptions
43 and answer to the original petition of the plaintiff herein, but
confirming the same, should the court overrule such exceptions then and now pleaded, for answer to plaintiff's said supplemental and amended petition, denies all and singular the allegations therein contained, except so far as expressly hereinafter admitted, and specially denies the allegations of the said supplemental and amended petition, to wit: that at the date of the judgment of the third district court of New Orleans in the suit No. 17501 of the docket of that court, entitled Henry Samory vs. Samuel McCutcheon Montgomery, and at the date of the sale of S. McC. Montgomery's property under the execution which issued on said judgment, and continuously, between those dates, the property herein involved was in the possession of the United States and under their control, the government having taken possession of the same as abandoned property.

And defendant further avers that the sheriff did legally seize and sell the said property under the proceedings in that suit; that all and singular the proceedings therein were lawful and regular and valid
44 in law, and that defendant is now in possession of the said property, as the true and lawful owner thereof, as set forth in his

original answer in good faith, under a just and legal title, and that he has been so since the 5th day of February, 1864, and cannot be disturbed in such title and possession; and that he is entitled to be recognized by this court as the true and lawful owner of said property under the just and legal title executed and delivered to him by the sheriff and confirmed by a final judgment on a monition.

Wherefore defendant prays that plaintiff's petition herein and the said supplemental and amended petition be dismissed with costs, and that judgment be rendered in his favor with costs, and for such further relief as equity, law, and the nature of this case may require.

(Signed) CARLETON HUNT,
(Do.) RANDELL HUNT,
Of Counsel.

Rule.—Extract from minutes of April 14th, 1875.

M. R. MONTGOMERY
vs. } No. 6399.
H. SAMORY.

45 On motion of Thomas Hunton, for plaintiff, it is ordered that defendant show cause on Saturday, the 17th inst., at 11 o'clock a. m., why the ex-parte order of court setting aside the argument of counsel to waive a trial by jury in this case should not be set aside and vacated.

Corrected plea of prescription and order.—Filed December 21st, 1875.

U. S. c't c't.

MONTGOMERY
vs. } No. 6399.
SAMORY.

Now comes into the court Henry Samory, the defendant, and amends the exception and plea of prescription heretofore filed in his behalf as follows, to wit:

That he now pleads in addition to the articles of the civil code of L'a, heretofore pleaded by him, to set up prescription against the plaintiff's suit, article 3542 of the civil code of L'a, and article 3478 of the said code; that defendant now pleads by way of exception to the said suit that the same is barred by the prescription of five years under the said article 3542, and by the prescription of ten years under said article 3478.

46 Wherefore defendant amends accordingly his plea of prescription and exception to the plaintiff's supplemental petition hereinbefore filed, and otherwise confirms all and several the exceptions by him as heretofore pleaded in this case to plaintiff's original petition and also to plaintiff's supplemental petition as valid and sufficient in law as a bar herein, and defendant prays that the said exceptions be maintained and plaintiff's suit be dismissed with costs, and for all further and general relief.

(Signed) CARLETON HUNT,
(Do.) HENRY C. MILLER,
(Do.) RANDELL HUNT,
For Def'd't.

Let this corrected plea be filed.
December 21st, 1875.

W. B. WOODS, *Judge.*

Submission of exception and plea.—Extract from minutes December 22d, 1875. November term, 1875.

MARY R. MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

This cause was again called up for trial.

Thomas Hunton for plaintiff.

47 Randell Hunt, Carleton Hunt, and Finney & Miller, for defendant.

When, after hearing the evidence and argument on the exceptions and pleas of res judicata, the court took time to advise.

Renunciation—Filed December 22d, 1875.

MONTGOMERY
vs. } No. 6399.
SAMORY.

Now comes Mrs. Rosella Montgomery in her capacity of administratrix of the succession of Sam'l McCutcheon Montgomery, and says that there are no creditors of said succession, and that the property herein sued for, if recovered, would therefore necessarily be for the sole benefit of the heir. That as administratrix she renounces all right of action herein and consents and agrees that the suit be continued in the name of plaintiff.

(Signed) THO'S HUNTON, *Att'y.*
(Signed) ROSELLA MONTGOMERY,
Administratrix estate of S. McC. Montgomery.

Hearing on plea res judicata.—Extract from minutes of December 23rd, 1875.

MARY R. MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

In this case the counsel obtained leave of court to make further argument on the pleas of res judicata and the legal effect of the monition. And after hearing Tho's Hunton, esq., the matter is continued till tomorrow at 11 a. m.

(This reference approved.)

F. A. WOOFLEY, *Clerk.*

48 *Judgment on plea suit dismissed.—Extract from minutes of December 24th*, 1878.

MARY R. MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

This cause came on further to be heard on the pleas of res judicata and the effect of the monition, and after hearing the closing argument of Randell Hunt, esq., for reasons now orally assigned the court is satisfied that the exceptions are well taken. It is therefore ordered, adjudged, and decreed that the said exceptions be sustained, and plaintiff's suit dismissed with costs.

Order, parties allowed to file bills of exception.—Extract from minutes Dec'r 24th, 1875.

MARY A. MONTGOMERY }
vs. } No. 6399.
HENRY SAMORY. }

Ordered, that two weeks, or until the first meeting of the court, be allowed to the parties to file their bills of exceptions.

Rule for a new trial.—Filed Dec'r 28th, 1875.

U. S. circuit court.

MONTGOMERY }
vs. } No. 6399.
SAMORY. }

49 And now comes plaintiff, by counsel, and moves the court to grant a new trial herein, on the ground that the court erred in deciding that the homologation of the monition sued out by Samory caused the nullity of the sale of the property claimed by him, which nullity resulted from the want of seizure by the sheriff of the property sold.

2d. Because the court erred in maintaining the plea of res judicata, based on the homologation of said monition.

Bill of exception No. 1.—*Filed Jan'y 19th,* 1876.

U. S. circuit court.

MARY R. MONTGOMERY }
vs. }
HENRY SAMORY. }

Be it remembered that when this case was called for trial, and before the jury was empanelled, the defendant moved the court to decide the exceptions of res judicata based upon the records of the suit and the judgment of the supreme court of Louisiana in the case of Henry Samory vs. Samuel McC. Montgomery, and upon the monition and judgment of the 3rd district court of New Orleans, homologating the sher-
50 iff's sale to defendant of the property herein sued for, said records being hereto attached as part of this bill and marked A & B, which motion of defendant the court then and there entertained.

The plaintiff, by her attorney, moved the court to have the whole case tried by jury, and objected to the trial of the exception by the court; but the court overruled the plaintiff's motion and objection, and proceeded to the trial of the exceptions of res judicata, to which ruling of the court the plaintiff, by her counsel, then and there excepted and took this bill of exceptions, which is signed and sealed this 19th day of January, A. D. 1876.

(Signed) W. B. WOODS, [SEAL.]
Judge.

Bill of exception No. 2.—Filed January 19th, 1876.

U. S. circuit court.

MARY R. MONTGOMERY
vs. } No. 2.
HENRY SAMORY.

On the trial by the court of defendant's exception of res judicata, based upon the monition and the judgment of the State court homologating the same, be it remembered that when this cause was called
51 for trial, and before the jury was empanelled, the defendant moved the court to decide the exception of res judicata based upon the judgment of the supreme court in the case of Henry Samory vs. Samuel McC. Montgomery and on the monition and judgment of the third district court of New Orleans homologating the sheriff's sale to the defendant of the property herein sued for, which motion the court entertained, and thereupon the defendant offered, and there was received in evidence, the records of the said suit and judgment therein of Henry Samory vs. Samuel McC. Montgomery and of the monition and judgment therein, hereto attached and made part of this bill, marked A & B, and the plaintiff, by his counsel, moved the court to decide that the monition referred to in the exceptions and pleadings of defendant, and the judgment of the said court homologating the same, were and are insufficient in law to cure or remedy the nullity, if it existed, of the sale, as alleged in plaintiff's petition, resulting from the failure of the sheriff to make a seizure of the property sold and described in
52 said monition.

But the court refused to decide and adjudge as requested, and, on the contrary, ruled and decided that the monition sued out and published by Samory, and the judgment of the third district court of New Orleans homologating the same and confirming the sheriff's sale, had the effect in law of curing the alleged defect in Samory's title resulting from a want of seizure by the sheriff of the property sold, and had the effect of res judicata and operated as a bar against any claim of plaintiff based upon the alleged want of seizure of the property, and concluded the plaintiff from offering any evidence to support his allegation of the want of seizure, and the court maintained the said exception of res judicata, and to which refusal of the court to decide as requested and to the judgment of the court maintaining the said exception, the plaintiff, by counsel, then and there excepted and rendered this bill of exception, which is signed and sealed this 19th day of January, A. D. 1876.

(Signed) W. B. WOODS, *Judge.* [SEAL.]

53 *Bill of exception No. 3.—Filed January 19th*, 1876.

MARY C. MONTGOMERY
vs. }
HENRY SAMORY.

On the trial by the court of defendant's exception of res judicata based upon the monition and the judgment of the State court homologating the same. Be it remembered that on the trial of the said exception of res judicata herein, the defendant having offered, and there having been received, in evidence the record of the suit of Samuel McC. Montgomery, and judgment therein of the Supreme Court, and of the monition and judgment therein of the third district court of New Orleans homologating the sheriff's sale to defendant of the property herein sued for, hereto attached and make part of this bill, and marked **A & B**,

Plaintiff, by counsel, moved the court to decide that the peremptory exception of res judicata based upon the monition and the judgment of the State court homologating the same as pleaded in bar of plaintiff's action is an admission in law for the purposes of the trial of the 54 exception of the truth of the allegation of plaintiff's petition that there was no valid seizure by the sheriff or valid sale of the property, the title to which is sought to be annulled in this action.

But the court ruled otherwise and refused to decide and adjudge as requested; to which ruling and refusal the plaintiff, by counsel, then and there excepted, and tendered this bill of exception, which is signed and sealed, this 19th day of January, A. D. 1876.

(Signed) W. P. WOODS, [SEAL.]
Judge.

Record A, made part of plaintiff's bills of exception.—Filed January 19th, 1876.

STATE OF LOUISIANA:

Third district court of New Orleans.

HENRY SAMORY
vs.
SAMUEL McCUTCHEON MONTGOMERY. } No. 17501.

Petition.—Filed November 10th, 1863.

To the honorable the third district court of New Orleans:

The petition of Henry Samory, a loyal citizen, residing in New 55 Orleans, respectfully represents that Samuel McCutcheon Montgomery, of this city, is really and truly indebted unto him, with privilege of mortgage on the property hereinafter described:

1st. In the sum of fifteen thousand six hundred and forty dollars, exclusive of costs and interest.

2d. In another sum of seven hundred and eighty-two dollars for attorney's fees for this, to wit: that your petitioner is holder and owner of four promissory notes made by the said Samuel McCutcheon Montgomery to his own order, and by him endorsed, three for the sum of five thousand dollars each, dated New Orleans, on the 24th of May, 1861, and payable six months after date, made by said Samuel McCutcheon Montgomery to his own order, and by him endorsed, and protested for non-payment on the 27th of November, 1861, said notes bearing interest at the rate of 8% from maturity until paid.

Another note for the sum of six hundred and forty dollars, made by said Samuel McCutcheon Montgomery to his own order, and by him endorsed, through his agent, T. E. Bonford, dated at New Orleans, 56 January 13th, 1862, and payable twelve months after date, with 8% per annum until paid, which note was not paid at maturity; which said notes are secured with all other eventual acts by two acts of mortgage passed before Edward Barnett, notary public, one dated May 28th, 1861, and the other on the 13th of January, 1862, on the following described property:

A certain lot of ground, with the buildings and improvements there-

on, situated in the first district of this city, in the square bounded by Camp, Gravier, S't Charles, and Common streets, forming the corner of Camp and Common streets, and measuring twenty-three feet six inches front on Camp street by a depth and front on Common street about fifty-four feet, bounded in the rear by the property of H. W. Montgomery, and on the other side by that of M'r's Krumbhaer; which said lot comprises the whole of the lot designated by the number one on the plan drawn by L. E. Reynolds, deposited as the plan No. 171 in the book of plans of Theodore Guyol, notary public, which was acquired by said
57 mortgager in and by an act of partition with his co-heir, Hugh Montgomery, by act passed before said Theodore Guyol, notary, on the sixteenth of December, 1859; and also all that part of the alley marked on said plan which is embraced within the extension of the side lines of said lot No. one back to the line of the lot No. two on said plan, belonging to H. W. Montgomery, which part of said alley was acquired by the mortgager by an act of agreement passed between him, M'r's Krumbhoer, W. H. Montgomery, and H. W. Montgomery, before the said notary, Theodore Guyol, on the 7th of February, 1861, as it more particularly appears by the said acts of mortgage and the said promissory notes hereto annexed for reference, and made part of this petition.

Petitioner alleges amicable demand of payment of said amounts, and a refusal from the part of said defendant.

Wherefore, the premises being considered, petitioner prays that the said Samuel McCutcheon Montgomery be duly cited to appear and answer this petition, and that after legal delay and due proceedings had, he be condemned to pay to petitioner with mortgage privilege upon the
58 property above described—

1st. The sum of fifteen thousand dollars, being the amount of the three promissory notes, each for the sum of five thousand dollars, annexed to this petition, with 8% interest per annum, from the 27th of March, 1861, until paid, together with nine dollars costs of protest.

2d. Another sum of six hundred and forty dollars, being the amount of another promissory note annexed to this petition for six hundred and forty dollars, with interest at the rate of 8% per annum from the 16th January, 1863, until paid.

3rd. And the sum of seven hundred and eighty-two dollars for attorney's fee, fixed by the contract, and also the costs of this suit.

And petitioner prays also for general relief, and as in duty bound he will ever pray.

(Signed) J. L. TISSOT, *for himself and*
MICHAEL HAHN,
Attorneys for Plaintiff.

I hereby certify the above and foregoing to be a true and correct copy of the petition in the suit wherein Henry Samory is plaintiff, and
59 Samuel McCutcheon Montgomery is defendant, instituted in the third district court of New Orleans under the No. 17501 of the docket of said court, of which record I am the proper and legal custodian.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of the third district court for the parish of Orleans this 22d day of December, A. D. 1875, and in the 100th year of the Indepen'ce of the United States of America.

[SEAL.] (Signed) CHA'S A. BAQUIE,
Clerk.

Citation.

Third district court of New Orleans.

The State of Louisiana to M'r Samuel McCutcheon Montgomery:

You are hereby summoned to comply with the demand contained in this petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the third district court of New Orleans in the city of New Orleans in ten days after the service hereof.

Witness the honorable W. W. Handlin, judge of the said court, the 10th day of November, in the year of our Lord one thousand
60 eight hundred and sixty-three.

C. F. BERENS, *Clerk.*

Sheriff's return.

Received November 9th, 1863. After diligent search and inquiry made S'l McCutcheon Montgomery could not be found, and I learned that he was out of the State.

Returned November 18th, 1863.

(Signed) H. NIXON,
D'y Sheriff.

I do hereby certify the above and foregoing to be true and correct copies of the original citation and sheriff's return thereon in the suit wherein Henry Samory is plaintiff and Samuel McCutcheon Montgomery is defendant, instituted in the third district court of New Orleans under the No. 17501 of the docket of said court, and of which record I am the proper and legal custodian.

In testimony whereof I have hereunto set my hand and affixed the seal of the third district court for the parish of Orleans this 22d day of December, A. D. 1875, and in the 100th year of the Independence of the United States of America.

[SEAL.] (Signed) CHA'S H. BAQUIE,
Clerk.

61 *Supplemental petition.—Filed November 19th, 1863.*

STATE OF LOUISIANA:

Third district court of New Orleans.

HENRY SAMORY
vs. } 17501.
SAMUEL MCCUTCHEON MONTGOMERY.

To the honorable the third district court of New Orleans:

The supplemental petition of Henry Samory, a loyal citizen residing in this city, respectfully represents that he has instituted before this court, under No. 17501 of its docket, a suit against the said Samuel McCutcheon Montgomery, a resident of this city, founded on obligations secured by mortgage; that the said defendant has been duly cited, but after diligent search and inquiry made, he could not be found, and the competent officer charged to deliver to him the petition and citation was informed that he was out of the State, as it fully appears by the sheriff's return of the paper made in this case; that this suit is instituted for the purpose of subjecting the mortgaged property to the payment of said debt; but as the said Samuel McCutcheon Montgomery is absent from the State, it is necessary to appoint a curator ad 62 hoc to represent him, in order that judgment may be rendered contradictorily with the said curator in this suit.

Wherefore, the premises being considered, your petitioner humbly prays the court to appoint a curator ad hoc, to represent and defend the said Samuel McCutcheon Montgomery in this case, and that said defendant be duly cited through said curator ad hoc, to answer this supplemental petition, and the original petition in this case, and that judgment be rendered against him, as prayed for in the original petition, and he prays that this supplemental petition be received by the court, and for general relief.

(Signed) J. L. TISSOT and
MICHAEL HAHN,
Att'ys for Pet'r.

Order.

Let this supplemental petition be filed as prayed for, and let J. G. Murtah, esq., be appointed curator ad hoc to represent the absent defendant.

New Orleans November 19th, 1863.

(Signed) W. W. HANDLIN, *Judge.*

Sheriff's return on the original petition.

Received November 20th, 1863, and on the 23rd day of the same 63 month and year, served copy of the within citation and accompanying petition, personally, and J. G. Murtagh, curator ad hoc for the defendant herein. Returned same day.

(Signed) ARTHUR HART,
D'y Sh'ff.

Citation.—Supplementa' petition.

Third district court of New Orleans.

The State of Louisiana to M'r Samuel McCutcheon Montgomery:

You are hereby summoned to comply with the demand contained in the supplemental petition of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the third district court, in the city of New Orleans, in ten days after the service hereof.

Witness the honorable W. W. Handlin, judge of the said court, the 19th day of November, in the year of our Lord 1863.

(Signed) C. F. BERENS, *Clerk.*

Sheriff's return.

Received November 20th, 1863, and on the 23d day of the same month and year, served copy of the within citation and accompanying petition personally on J. G. Murtagh, curator ad hoc for the defendant herein.

Returned same day.

(Signed) ARTHUR HART.
D'y Sh'ff.

64 I hereby certify that the above and foregoing do contain a true and correct copy of the supplemental petition, order of court thereon, citation, and sheriff's return of the supplemental petition in the suit wherein Henry Samory is plaintiff, and Samuel McCutcheon Montgomery is defendant, instituted in the third district court of New Orleans, under the No. 17501, and the records of which court I am now the proper and legal custodian.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of the third district court for the parish of Orleans this 22d day of December, A. D. 1875, and in the 100th year of the Independence of the United States of America.

[SEAL.] (Signed) CHA'S A. BAQUIE, *Clerk.*

Answer.—Filed November 23rd, 1863.

STATE OF LOUISIANA:

Third district court of New Orleans.

HENRY SAMORY
vs. 17501.
SAMUEL MCCUTCHEON MONTGOMERY.

65 Now comes into court the undersigned curator ad hoc of the defendant in the above cause, and for answer to plaintiff's petition denies all and singular the allegations therein contained, and requires strict proof of the same.

(Signed) J. G. MURTAGH,
Curator ad hoc.

I hereby certify the above to be a true and correct copy of the answer filed in the suit, wherein Henry Samory is plaintiff and Samuel McCutcheon Montgomery is defendant instituted in the third district court of New Orleans, under the number 17501 of the docket of said court, and of which records I am the proper and legal custodian.

In witness whereof I have hereunto set my hand and affixed the impress of the seal of the third district court for the parish of Orleans on this 22d day of December, A. D. 1875, and in the 100th year of the Independence of the United States of America.

[SEAL.] (Signed) CHARLES A. BAQUIE,
Clerk.

Judgment.

STATE OF LOUISIANA:

Third district court of New Orleans.

HENRY SAMORY
vs. 17501.
SAMUEL MCCUTCHEON MONTGOMERY.

66 This case came on to-day for trial.

J. L. Tissot for plaintiff.

J. G. Murtagh, curator ad hoc to absent defendant.

And the court being satisfied from inspection of the proof contained in the record, and the proof adduced that the plaintiff's claim is correct, is ordered, adjudged, and decreed that the plaintiff, Henry Samory, do recover of the defendant, Samuel McCutcheon Montgomery—

First. The sum of fifteen thousand dollars the amount of three promissory notes each for the sum of five thousand dollars each, with 8% interest per annum from the 27th November, 1861, until paid, together with nine dollars costs of protest.

Second. Another sum of six hundred and fifty dollars, being the amount of another promissory note for that sum, with interest at the rate of 8% per annum from 16th January, 1863, until paid.

Third. And the further sum of seven hundred and eighty-two dollars attorney's fees with lien and privilege on the mortgaged property described in the petition and copy of the acts of mortgage on file
67 for the payment of the foregoing amounts and costs of suit.

And it is further ordered that a fee of $100.00 be taxed in the costs to J. G. Murtagh, esq., curator ad hoc to absent defendant.

Rendered December 8th, 1863.

Signed December 12th, 1863.

(Signed) W. W. HANDLIN,
Judge.

I hereby certify the above and foregoing to be a true and correct copy of the judgment rendered by the third district court of New Orleans in the suit, wherein Henry Samory is plaintiff and Samuel McCutcheon Montgomery is defendant, instituted in the aforesaid court under the number 17501, and the records of which court I am now the proper and legal custodian.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of the third district court for the parish of Orleans, this twenty-second day of December, A. D. 1875, and in the 100th year of the Independence of the United States of America.

[SEAL.] (Signed) CHA'S A. BAQUIE.
Clerk.

Petition for devolutive appeal.—Filed July 15th, 1865.

STATE OF LOUISIANA:

Third district court of New Orleans.

68 HENRY SAMORY
vs.
SAMUEL McCUTCHEON MONTGOMERY. } No. 17501.

The petition of Samuel McCutcheon Montgomery, a resident of New Orleans, respectfully shows that during his temporary absence from the State of Louisiana, Henry Samory, the plaintiff in the above-entitled suit, obtained a final judgment against your petitioner in this honorable court on the 8th day of December, 1863, and signed on the 12th day of December, 1863, 1st for the sum of $15,000; 2d, for the sum of $650; and 3rd, for the sum of $782, attorney's fees and costs of suit, making the total of $16,432 and costs of suit. That said judgment was rendered against your petitioner without his having been previously cited as the law directs, and without there having been any contestatio litis, and that by law he has a right to take a devolutive appeal from said judgment at any time within two years from the day of its rendition. That

said judgment causes him irreparable injury and he is informed and believes there is error in the same. That he desires to take devo-
69 lutive appeal from said judgment to the supreme court of the State of Louisiana.

Wherefore he prays to be allowed to take a devolutive appeal from said judgment upon his giving bond with such surety as the court may direct. That said appeal be made returnable to the supreme court of the State of Louisiana at such time as the court shall direct, and that the said Henry Samory be cited to answer.

(Signed) WILLIAM H. HUNT, *Att'y.*

I hereby certify the above and foregoing to be a true and correct copy of the petition for devolutive appeal in the suit wherein Henry Samory is plaintiff and Samuel McCutcheon Montgomery is defendant, instituted in the third district court of New Orleans under the number 17501, and the records of which court I am now the proper and legal custodian.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of the third district court for the parish of Orleans this 22d day of December, A. D. 1875, and in the 100th year of
70 the Independence of the United States of America.

(Signed) CHA'S A. BAQUIE, *Clerk.*

Order of court.

A devolutive appeal is allowed in this case as prayed for and according to law, appellant giving bond with good and solvent security in the sum of two hundred and fifty dollars, conditioned as the law directs; said appeal made returnable to the supreme court of this State on the 1st Monday of November, 1865.

(Signed) E. T. FELLOWES, *Judge.*

NEW ORLEANS, *July 15th*, 1865.

I hereby certify the above to be a true and correct copy of the order of court granting a devolutive appeal in the case wherein Henry Samory is plaintiff and Samuel McCutcheon Montgomery is defendant, instituted in the 3rd district court of New Orleans under the No. 17501 of the docket of said court, and of which record I am now the proper and legal custodian.

In testimony whereof I have hereunto set my hand and affixed the seal of the third district court for the parish of Orleans on this
71 22d day of December, A. D. 1875, and in the 100th year of the Independence of the United States of America.

[SEAL.] (Signed) CHA'S A. BAQUIE, *Clerk.*

Extract from the minutes.

Supreme court of La.

WEDNESDAY, *May 2d*, 1866.

HENRY SAMORY
vs.
SAMUEL M. MONTGOMERY. } No. 700.

On motion of William H. Hunt, attorney for appellant, and on suggesting to the court that since this appeal has been taken and fixing of the same for trial the said Montgomery has died and his succession opened in the second district court of New Orleans, and his widow, Rosella Montgomery, residing in New Orleans, has been confirmed as natural tutrix of her minor child, Mary Rosella, issue of her marriage with said deceased:

It is ordered that the said Rosella Montgomery, tutrix of the said minor, Mary Rosella Montgomery, be made party to the said appeal.

I hereby certify the foregoing to be a true and faithful extract from the minutes of this honorable court of the day, month, and year first above written.

72 In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court, at the city of New Orleans, this 22d day of December, 1875.

[SEAL.] (Signed) JNO. M. HOWELL, *Clerk.*

Opinion and decree.

Supreme court of the State of Louisiana.

HENRY SAMORY
vs.
SAMUEL McCUTCHEON MONTGOMERY. } No. 700.

Appeal from the 3rd district court of New Orleans.
Filed June 16th, 1867.
(Signed) M. P. JULIAN,
Dy Cl'k.

Mr. Justice TALIAFERRO:

In November, 1863, the plaintiff filed this suit against the defendant, alleging a large amount of indebtedness by him to the plaintiff, as owner and holder of five promissory notes, secured by a mortgage on a house and lot in the city of New Orleans.

The plaintiff had judgment in his favor for the amount claimed, with recognition of the lien and privilege on the mortgaged property described in the petition, and copies of the mortgages adduced in evidence.

73 Judgment was rendered on the 8th of December, 1863. On the 15th July, 1865, the defendant obtained an order of appeal. He urges, as irregularities in the proceedings, that, having his domicil in New Orleans, he was entitled to personal citation; that although absent at the time, that absence was only temporary, and that he was not an absentee of that kind which, in legal contemplation, a creditor is authorized to proceed against by causing a curator ad hoc to be appointed. He further contends that he had an agent in New Orleans whose name appeared in the petition, and that no copy of petition or of citation was served on the agent.

The plaintiff proceeded via ordiana, a citation was issued, and the sheriff made return "that after diligent search and enquiry made, Samuel McCutcheon Montgomery could not be found, and I learned that he was out of the State."

The plaintiff then, by supplemental petition, prayed for and obtained the appointment of a curator ad hoc to represent the defendant, and obtained against him so represented the judgment complained against. The facts appear to be that Montgomery, the defendant, left New Orleans in 1861, or at least that he was absent in January, 1862, and there is nothing making it probable that he returned before the

74 summer of 1865. He was absent with his wife in the State of
Virginia during the greater part of this time.

We find no act of procuration in the record from the defendant to T. E. Bonford, who acted in the capacity of agent or attorney in fact for defendant and wife, in the execution of the second mortgage to the plaintiff in January, 1862. Bonford was a judge of the supreme court of the State at or soon after that time under the appointment of Henry W. Allen, acting as governor under Confederate rule. The probability is that he was absent from New Orleans after the capture of the city in April, 1862, by the Federal forces.

The act of mortgage executed by him in January, 1862, recited that Bonford was the "agent and attorney in fact of Montgomery." We are not authorized to infer that his powers were sufficient to enable him to defend suits or to authorize the service of citation upon him. It is sufficiently clear that at the time the plaintiff's suit was filed in 1863 Montgomery had no agent in New Orleans upon whom citation could be served, or against whom as the legal representative of Montgomery legal
proceedings could have been carried on.

75 The only question in this case is, was Montgomery at the time
this suit was instituted an absentee in legal contemplation to whom a curator ad hoc might be appointed, and contradictorily with whom a suit might be prosecuted and a valid judgment obtained against the absent person.

If the term absentee can only be applied to persons who never had a domicil in the State, or who having had a domicil in the State has left it permanently, and lives permanently beyond its limits, it is plain that such a construction of the term would operate injurious and vexatious delays to creditors seeking to enforce claims against their debtors; on the other hand not every casual and temporary excursion of a resident from the State can convert him into an absentee, and render him liable to be harassed by his creditor, who to gratify improper feelings might resort to unnecessary acts to injure him, but where in a case like the present, the debtor is absent two or three years, has property in the State, but who leaves no housekeeper or person upon whom a citation can be served, has no agents to represent him, it would be leaving him
a large margin for the procrastination of payment of his debts to
76 permit him under such circumstances to plead that he had a dom-
icil in the State, and argue his right to personal citation when for so long a period he was absent, and had left no person upon whom such citation could be served. We think such a perversion of terms inadmissible. That the appointment of curator ad hoc in a case like the present is clearly within the scope and intendment of our law there can be doubt. Neither is it in conflict with the spirit of our jurisprudence.

The defendant refers to the case of Coole vs. Lucas, 2d An., 950, on the subject of domicil. Chief Justice Eustis, in that case, said: "A person going to another State for health, for pleasure, or any temporary purpose with the intention to return has a mere transitory residence, which constitutes no new domicil nor an abandonment of the old one." The facts of this case as well as those of 16th L., 595, and those of 12 L., 603, also quoted by defendant's counsel, as relates to the circumstances and character of the absence, differ widely from those of the one under consideration. Montgomery left New Orleans, it seems, in the year 1861, during the war. It is shown that his family left here also;
that they resided in Virginia. There is no evidence showing
77 an intention to return. He was engaged in war. He might not
survive the perils of war. The city of his former domicil was in

possession of the United States military forces. He might not desire to return. Taking the whole range of circumstances attending 'is absence, we think the case very different from that of a person absent a short time for health, pleasure, or some temporary purpose with the known intention to return. If the defendant had a domicil in and resided in the State he had no right to an appeal, for the time had elapsed within which he was entitled to appeal. How he could be an absentee to entitle him to two years to take an appeal and at the same time claim to be personally cited, seems to present some inc*rig*ouity. The case of M'r Livingston, 6 N. S., 15, referred to by plaintiffs' counsel, shows that the appointment of a curator ad hoc might be made to represent a person absent temporarily on public business where he had left no agent upon whom process could be served.

In 12 La., p. 604, it was laid down that "previous to the promulgation
of the Louisiana code and code of practice, the appointment of
78 a curator ad hoc to an absentee was not authorized by law. But
our present codes seem to have provided for all cases in which
absent persons may be interested, or in which rights are to be exercised
against them whether domiciliated in or out of the State.

This seems to have been the practice heretofore generally adopted. The case of Dapuy vs. Hunt, in 2d Annual, made no innovation upon this practice; it simply settled that the absentee must have property in the State upon which the action of the court could take effect and that judgments rendered against absentees had no effect beyond the property proceeded against.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed with costs in both courts. (14 L., 447; 15 L., 81; 2 An., 634; 6 Rob., 189; 13 An., 505; 18 An., 145.)

I hereby certify the foregoing to be a true copy of the opinion rendered in the above entitled case as recorded in my office. (Opinion book No. 35, page 457.)

In testimony whereof I have hereunto set my hand and affixed the seal of this honorable court at the city of New Orleans, this 22d day of December, 1875.

[SEAL.] (Signed) JNO. M. HOWELL,
Clerk.

79 *Record B, referred to in bill of exceptions, and filed January 19th, 1876.—Monition.*

STATE OF LOUISIANA.

Third district court of New Orleans.

The State of Louisiana to all whom these presents shall come, greeting:

Whereas Henry Samory having purchased at a sale made by the sheriff of the parish of Orleans the property hereinafter described, has applied to the clerk of this court in whose office the deed of sale was recorded on the tenth day of March, A. D. 1864, for a monition or advertisment in conformity to an act of the legislature of the State of Louisiana entitled "An act for the further assurance of titles to purchasers at judicial sales," approved the 15th day of March, 1855:

Now, therefore, know ye and all persons interested herein are hereby cited and admonished in the name of the State of Louisiana, and of the third district court of New Orleans, who can set up any right, title, or

claim in and to the property hereinafter described in consequence
80 of any informality in the order, decree, or judgment of the court
under which the sale was made, or any irregularities or illegality in the appraisements and advertisements in time or manner of sale or for any other defect whatsoever, to show cause within thirty days from the day this monition is first inserted in the public papers why the sale so made should not be confirmed and homologated.

The said property was sold by the sheriff of the parish aforesaid on the fifth day of February, 1864, by virtue of a decree of this court rendered on the 8th day of December, A. D. 1863, in a suit entitled Henry Samory vs. Samuel McCutcheon Montgomery, No. 17501 of the docket of this court, at which sale Henry Samory became the purchaser for the price of $14,000 cash.

Description of property as given in the judicial conveyance, viz:

A certain lot of ground with the buildings and improvements thereon, comprising a three-story brick house, slate roofed and now occupied by Phinney and Amory, auctioneers, situate in the first district of this city, in the square bounded by Camp, Gravier, S't Charles, and Common streets, forming the corner of Camp and Common streets, and measuring twenty-three feet six inches front on Camp street by a depth
81 and front on Common street of about fifty-four feet, bounded in
the rear by the property of H. W. Montgomery, and on the other side by that of M'r's Krumbhuar; which said lot comprises the whole of the lot designated by the number one on the plan drawn by L. E. Reynolds, deposited as plan number one hundred and seventy-one in the book of plans of Theodore Guyol, late a notary public in this city, which was acquired by defendant by an act of partition with his co-heir Hugh W. Montgomery, by an act passed before said Theodore Guyol, notary, on the 16th day of December, 1859.

And also all that part of the alley marked on said plan, which is embraced within the extension of the said lines of said lot number one, back to the line of the lot number two, on said plan belonging to H. W. Montgomery, which part of said alley was acquired by the defendant by an act of agreement passed between him, W. F. Krumbhaar, W. H. Montgomery, and H. W. Montgomery, before said Guyol, notary, on the 7th February, 1861.

The said defendant and the said H. W. Montgomery acquired the said property by inheritance from their late father, Robert R.
82 Montgomery, of whom they were recognized the sole forced testamentary heirs, and as such ordered to be put in possession of his estate, as per decree of the second district court of New Orleans, bearing date the 9th of November, 1859, and the said Robert R. Montgomery had acquired the same from the successions of Samuel McCutcheon and Mrs. Robert Butler, by act passed before said Guyol, notary, on the 29th May, 1849.

Witness the honorable W. W. Handlin, judge of the said court, this 10th day of March, 1864.

(Signed) C. F. BERENS, *Clerk.*

Proof of publication.—Filed June 9th, 1864.

Third district court of New Orleans.

HENRY SAMORY
vs.
SAMUEL MCCUTCHEON MONTGOMERY.

I certify that the due publication according to law have been given in the New Orleans Bee newspaper, published in New Orleans, and that no opposition has been filed.

New Orleans, June 9th, 1876.

(Signed) C. T. BERENS, *C.*

83 *Judgment homologating monition.*

Third district court.

HENRY SAMORY
vs.
SAMUEL MCCUTCHEON MONTGOMERY. } No. 17501.

On motion of J. L. Tissot, of counsel for Henry Samory, and showing to the court that pl'ff, Henry Samory, in the above case, has purchased at a sale made by the sheriff of the parish of Orleans, in virtue of a fi. fa. issued in the above case, the following-described property, to wit:

A certain lot of ground, with the buildings and improvements thereon, comprising a three-story brick house, slate-roofed, and now occupied by Phinney and Amory, auctioneers, situated in the first district of this city, in the square bounded by Camp st., Charles, Gravier, and Common street, forming the corner of Camp & Common streets, and measuring 23 feet 6 inches front on Camp street, by a depth and front on Common street of about 54 feet; bounded in the rear by the property of H. W. Montgomery, and on the other side by that of Mrs. Krumbhaar, which said lot comprises the whole of the lot designated by the No. 1 on the plan drawn by L. E. Reynolds, deposited as plan No. 171, in the book of plans of Theodore Guyol, late a notary public in this 84 city, which was acquired by defendant by an act of partition, with his co-heir, Hugh W. Montgomery, by an act passed before Theodore Guyol, notary, on the 6th day of December, 1859. And also all that part of the alley marked on said plan, which is embraced within the extension of the side line of said lot No. 1, back to the line of lot No. 2 on said plan, belonging to H. W. Montgomery, which part of said alley was acquired by the defendant by an act of agreement passed between him, W. F. Krumbhaar, W. H. Montgomery, and H. W. Montgomery, before the said Theodore Guyol, notary, on the 7th February, 1861.

The said defendant and the said H. W. Montgomery acquired the said property by inheritance from their late father, Robert R. Montgomery, of whom they were recognized the sole forced testamentary heirs, and as such ordered to be put into possession of his estate, as per decree of the second district court of New Orleans, bearing date the 9th of November, 1859, and the said Robert R. Montgomery had acquired the same from the succession of Samuel McCutcheon and Mrs. Robert Butler by act passed before said Guyol, notary, on the 20th of May, 1849, and further showing to the court that the said Henry Samory has applied to the clerk of this court, in whose office the deed of sale 85 was recorded on the 10th of March, 1864, for a monition advertising in conformity with the law, and on showing that the said monition has been published according to law, and that no opposition has been made to the prayer and demand of H. Samory, and to the confirmation and validity of said sale.

Now it is ordered by the court, that the said sale be confirmed and homologated according to law.

Rendered June 9th, 1864.
Signed June 15th, 1864.
(Signed) W. W. HANDLIN,
Judge.

I hereby certify the above and foregoing to be true and correct copies of the monition, proof of publication, and judgment homologating monition in the suit wherein Henry Samory is plaintiff and Samuel McCutcheon Montgomery is defendant, instituted in the third district court of New Orleans, under the No. 17501 of the docket of said court, and of which records I am now the proper and legal custodian.

In testimony whereof, I have hereunto set my hand and affixed the seal of the third district court, for the parish of Orleans, on this 22d day of December, A. D. 1875, and in the 100th year of the Independence of the United States of America.

[SEAL.] (Signed) CHA'S H. BAQUIL,
Clerk.

86 *Consent to submit rule.—Filed January 29th*, 1876.

U. S. C. C.

MARY R. MONTGOMERY
vs. No.
HENRY SAMORY.

The rule for a new trial is hereby submitted.

(Signed) THO'S HUNTON,
Att'y for Pl'ff.
(Do) RANDELL HUNT,
For Def't.

Motion and order to amend decree and submission of same.—Extract from minutes of January 31st, 1876.

MARY R. MONTGOMERY
vs. No. 6399.
HENRY SAMORY.

The attorney for the plaintiff moving the court to amend the decree entered in this cause, after hearing counsel on both sides, the court took time to advise.

Trial judgment.—Extract from judgment book.—November term, 1875.

NEW ORLEANS, *Monday, February 7th*, 1876.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.

MARY R. MONTGOMERY
vs. No. 6399.
HENRY SAMORY.

87 In this case it is ordered that the entry upon the minutes of the court made in this case on the 24th day of December, 1875,

and during the present term, being the judgment of the court upon certain peremptory exceptions filed by the defendant to the plaintiff's cause of action, be so amended as to read as follows:

This day came the parties by their attorneys, and thereupon this cause came on to be heard upon the 6th and 7th peremptory exceptions filed by the defendant to the plaintiff's cause of action on the 22d day of January, 1873, the said exceptions being renewed and reiterated by the 3rd exception filed by the defendant on the 25th day of March, 1875, the exceptions so coming on for hearing being as follows:

"6th. The defendant pleads res adjudicata, the thing demanded is the same, the demand is between the same parties, founded on the same cause of action, and formed by them against each other in the same quality, and was adjudicated upon as appears by the judgment in record, No. 17501, of the third district court, entitled H. Samory vs. S. M. Montgomery, affirmed in the supreme court in record No. 700 of said court.

88 "7th. That the judgment of the third district court, rendered on the 9th of June, 1864, upon a monition, and confirming and homologating the sale made to R. Samory, operates as a complete bar against all persons, whether of age or not, and is full and conclusive proof that the sale was made according to law."

And said exceptions having been argued by counsel and considered by the court, the court is of opinion and finds that the said judgment, in record No. 17501, of the said third district court, in the case of H. Samory vs. S. M. Montgomery, affirmed by the supreme court, is a valid judgment between the parties and their privies, and cannot be collaterally attacked or impeached, but of itself and standing alone is not conclusive of the controversy between the parties in this cause, and the court is further of opinion and finds that the said judgment of monition, referred to in said 7th exception, operates as a complete bar against all persons seeking to call in question the legality of the proceedings resulting in the sale of said premises, and is full and conclusive proof that the sale was made according to law.

And the court being of opinion that the said judgment referred
89 to in said 6th exception is valid and binding, and that the proceedings and sale founded on said judgment have been homologated and confirmed by the said monition referred to in the 7th exception, which is full and conclusive proof that the sale was made according to law, and being therefore of opinion that the title of the defendant to the premises in question is based upon a valid sale founded on a valid judgment, it is ordered and adjudged that said 6th and 7th exceptions, taken jointly, be sustained, and that the controversies in this case having been adjudicated between the parties, the plea of res adjudicata as presented in said 6th and 7th exceptions be sustained, and it is therefore further ordered and adjudged that the cause be dismissed at plaintiff's costs.

Judgment rendered February 7th, 1876.
Judgment signed February 8th, 1876.
(Signed) W. B. WOODS, *Judge.*

Motion and order for writ of error.—Extract from minutes of February 19th, 1876.

MARY R. MONTGOMERY
vs. } No. 6399.
HENRY SAMORY.

90 On motion of Thomas Hunton, attorney for plaintiffs, and on

suggesting that there is error in the judgment herein to the prejudice of plaintiff, it is ordered that the said plaintiff be allowed a writ of error to the Supreme Court of the United States, returnable on the second Monday of October, 1876, the said plaintiff having given a bond for costs, approved by the court.

Bond for writ of error.—Filed February 18th, 1876.

Know all men by these presents, that we, Mary R. Montgomery, by Rosella Montgomery, her guardian, next friend, and natural tutrix, as principal, and Hugh Montgomery as surety, are held and firmly bound unto Henry Samory in the full and just sum of five hundred dollars to be paid to the said Henry Samory, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents, sealed with our seals and dated this 15th day of February, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately at a circuit court of the United States, fifth
91 judicial circuit, holding sessions in and for the district of Louisiana, at New Orleans, in a suit depending in said circuit court, wherein Mary R. Montgomery by Rosella Montgomery, tutrix, &c., is plaintiff, and Henry Samory, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry Samory citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the 2d Monday of October next:

Now the condition of the above obligation is such that if the said plaintiff shall prosecute her writ to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) MARY R. MONTGOMERY.
ROSELLA MONTGOMERY, *Tutrix, &c.* [L. S.]
(Signed) HUGH W. MONTGOMERY, *Surety.* [L. S.]

Approved.
(Signed) W. B. WOODS,
U. S. Judge.

92 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 91 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of Mary Rosella Montgomery versus Henry Samory, No. 6399, of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court at the city of New Orleans, this 27 day of September, A. D. 18 .

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, William B. Woods, United States judge for the district of Louisiana, do certify, that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 27th day of September, A. D. 1876.

W. B. WOODS, *Judge.*

93 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Henry Samory, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Mary R. Montgomery, by Rosella Montgomery, her tutrix, next friend, and guardian, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff as in said mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of February, in the year of our Lord one thousand eight hundred and seventy-six.

W. B. WOODS, *Judge.*

94 (Indorsed:) United States circuit court. No. 6399. Mary R. Montgomery, by Rosella Montgomery, her tutrix, next friend, & guardian, plaintiff in error, vs. Henry Samory, defendant in error. Citation.

Received Feb. 21, 1876, by the U. S. marshal and marshal's return. The defendant, Henry Samory, and Randell Hunt, one of his attorneys, both being absent from the State, I served this citation in error on Henry C. Miller, esq., and on Carleton Hunt, esq., two of defendants' attorneys of record, by delivering to each of them a copy of this writ in person—to the former on the 16th and to the latter on the 17th of August.

S. B. PACKARD,
U. S. Marshal.
By C. R. STEELE,
D'y Marshal.

On this 14th day of August, 1876, personally appeared before me, the subscriber, C. R. Steele, and makes oath that he served copies of the within citation as stated in his official return hereon.

C. R. STEELE,
D'y U. S. Marshal.

Subscribed and sworn to before me this 17th day of August, 1876.

F. B. VINOT,
U. S. Comm'r.

95 UNITED STATES OF AMERICA, *ss :*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Mary R. Montgomery, by Rosella Montgomery, her tutrix, next friend, and guardian, plaintiff, and Henry Samory, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by her complainant appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of Ocsober next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 19th day of February, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6399. Mary R. Montgomery, by Rosella Montgomery, her tutrix, next friend and guardian, plaintiff in error, versus Henry Samory, defendant in error. Writ of error. Filed February 19th, 1876. J. B. Vinot, d'y cl'k.

(Indorsement on cover:) No. 178. Mary R. Montgomery, by Rosella Montgomery, her tutrix, next friend & guardian, plaintiff in error, vs. Henry Samory. Louisiana C. C. U. S. Filed 2 October, 1876.

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United States Supreme Court.

No. 178.

MARY R. MONTGOMERY, TUTRIX, ETC.,

versus

HENRY SAMORY.

Brief of Plaintiff in Error.

THOMAS HUNTON,

Of Counsel.

Clark & Hofeline, Brief Printers, 112 Gravier Street.

United States Supreme Court.

No. 178.

MARY R. MONTGOMERY, TUTRIX, ETC.,

versus

HENRY SAMORY.

Brief of Plaintiff in Error.

This is a suit by plaintiff to recover a lot of ground with the buildings thereon in the city of New Orleans, which was bought by the defendant at an execution sale, under a judgment rendered by the Third District Court of the city of New Orleans in the year 1863.

The plaintiff alleges that the sale was invalid and null for the reasons set forth in the original petition, and in the amended petition, pp. 14, 15, of the Transcript.

HISTORY OF THE CASE.

The parties having waived a jury, the suit was tried by the Court—Hon. E. H. Durell, acting Circuit Judge. It was submitted to the Court on the 28th of March, 1873, and a judgment rendered on the 18th of June, following, in favor of the plaintiff. Trans., p. 11.

A motion for a new trial was made on behalf of defendant, which came up before Judge Woods at the November Term, 1874, and a new trial granted. On the second trial, the Court, upon certain exceptions which had been filed prior to the first trial of the case, rendered judgment for the defendant.

THE FACTS OF THE CASE,

as found by the Judge and set forth on page 13, of the Trans., are as follows:

1st. That during the summer of 1861, Samuel McCutchon Montgomery, the father of plaintiff, entered into the service of the "Confederate States," and remained absent from his domicil in New Orleans, until 1865, and was during that period beyond the lines of occupation of the military forces of the United States.

2nd. That during the period aforesaid, and after the proclamation of the president, of December, 1863, Montgomery was not permitted to return to New Orleans, and could not have done so, without subjecting himself to arrest and punishment by the Confederate authorities.

3rd. That prior to June, 1867, the said Montgomery died intestate, leaving as his sole heir the minor, Mary R. Montgomery, the plaintiff, of whom her mother is guardian and tutrix.

4th. That up to the date of the sale, made by the sheriff under the judgment of the Third District Court of New Orleans, on the — day of February, 1864, at which the defendant purchased the property in the petition mentioned, the said Montgomery was the true and lawful owner of the property described in plaintiff's petition.

5th. That the title of Montgomery was not divested by the sale made under the judgment of the Third District Court of New Orleans, under which defendant claims said property. *That the sheriff, who made the sale, never took possession of the property under the writs of execution—did not make a valid seizure thereof, nor did he record in the mortgage office the seizure, as required in the absence of an actual seizure and possession of property taken under execution.*

6th. That the property claimed by plaintiff is worth from $40,000 to $50,000, and rents for $5,000 per annum.

7th. That after Montgomery's return to New Orleans, in 1865, he offered to pay to Samory the whole of the mortgage debt, which he had held against the property—principal, interest, costs and charges, *in gold*, if Samory would reconvey, which offer the latter declined.

The foregoing were the facts found by the Court on the first trial of the case. Prior to the second trial an amended petition was filed by the plaintiff, in which it was further alleged "that at the date of the judgment of Samory vs. Montgomery, and at the date of the sale of Montgomery's property, under the execution which issued on said judgment, and continuously between those dates, the said property being the same, the title to which is sought to be annulled in this suit, *was in possession of the United States, and under their control, the government having taken possession of the same as abandoned property.*" And that the sheriff would not legally seize or sell the property under the writ of execution, and that there was no valid or legal seizure or sale of the property under the writ. That the sale was therefore a nullity, and conferred no title on the purchaser.

With the statement of facts above referred to, as having been found by the Court, on the first trial of the case, and the allegations of the amended petition above recited, before the Court, the Circuit Judge without a jury, and without the waiver of a jury on the second trial, decided the case, basing his decision on two peremptory exceptions, Nos. 6 and 7, on page 9 of the transcript; which exceptions had been originally filed in the case, and had been in effect overruled by the decision of the case on the first trial.

The plaintiff now assigns as errors apparent on the record, and shown by her bills of exceptions:

1st. That in view of the facts alleged in plaintiff's action and the issue joined, the Court erred in deciding the cause without the intervention of a jury. Bill of exception, No. 1, p. 19.

2d. That the Court erred in maintaining the exception of *res judicata* No. 6, and the exception No. 7, p. 9. See judgment, p. 34.

In taking the case from the jury and deciding it on exception pleaded in bar, all the allegations of the petition are to be taken as true. The facts alleged are admitted for the purposes of the exception; or, if not admitted, the plaintiff should have had an opportunity to offer his evidence before a jury.

Peremptory exceptions, under the law and pleading in Louisiana, are of two classes. Articles 345, 346 of the Code of Practice.

The one class is equivalent in import to a demurrer at common law.

The other class comprises those "which are founded on law, and may be pleaded in every stage of the action previous to the definitive judgment. But they must be pleaded specially, "and sufficient time allowed to the adverse party to bring his evidence." C. P. 346.

To this latter class belong the exceptions of *res judicata* and prescription.

The petition of the plaintiff alleged, p. 14, that there never had been any levy upon, or valid seizure of the property sold under defendadt's execution—that at the time of the pretended seizure and sale, the property was in the possession of the government of the United States, having been taken as "captured and abandoned property."

The Circuit Judge, ignoring these alleged facts which were susceptible of proof, suffered the defendant to offer in evidence in support of their exceptions certain records, and sustained the exceptions.

It is insisted that plaintiff had the right, if replications were allowable in Louisiana, to have replied: "*Nul tiel record*" to the plea of *res judicata*, and to the plea based on the monition, and to have replied and proved that the plaintiff was a minor and a citizen of the State of Mississippi, and that the publication of a monition in New Orleans during the war, for the space of thirty days, could not affect her rights.

The matters involved in such replications, would necessarily have been required to be submitted to a jury. Under Louisiana practice however, replications are not debt and for a decree establishing that he had a mortgage privilege upon certain described property. *He did not ask that any property should be decreed to be sold in satisfaction of his claim. The Court did not so decree.* This judgment was rendered on the 8th of December, 1863, p. 26.

The absent defendant having returned to New Orleans in 1865, took an appeal to the Supreme Court of Louisiana. That Court said, p. 29: "The only question in this case is, was Montgomery at the time this suit was instituted an absentee in legal contemplation, to whom a curator *ad hoc*, might be aspointed, and contradictorily with whom a suit might be prosecuted, *and a valid judgment obtained against the absent person.*" That question was decided affirmatively by the Supreme Court, and the judgment of the Lower Court was simply affirmed.

It may be here remarked that the Supreme Court seems to have considered the action a personal one; for, in stating the case, the following language is used: "The plaintiff had judgment in his favor for the amount claimed, with *recognition* of the lien and privilege on the mortgage property described, etc."

The present action as shown in the original petition, p. 2, and the supplemental petition, p. 15, is a suit to *annul a sale* made under an execution which issued on the above recited judgment and to recover *the property illegally sold.*

Now, it is manifest that the validity of the sale attacked in this suit, on the grounds set forth in the supplemental petition, p. 15, was not involved in the judgment of the Third District Court of New Orleans in the remotest manner. *It could not by any possibility have been litigated in that suit, for the sale had not yet taken place when that judgment was rendered*, and it was *that* judgment only which was affirmed by the Supreme Court.

It may be admitted, for the purposes of the argument, that Samory's judgment was valid; it may be conceded further that the judgment, *in totidem verbis*, decreed the sale of Montgomery's property, and yet the proceedings in execution of the judgment may have been so irregular and so wanting in the essential requisites of a judicial sale, as to make the title under the sale entirely worthless.

Thus, the sheriff might, under an unquestioned judgment, have sold property of the defendant without any writ or authority. He might, without having exposed the property to public sale, have merely conveyed the title to the judgment creditor in satisfaction of his judgment. He might have never levied upon or made seizure of the property before the sale; and can it be maintained that the judgment debtor is barred from asserting the nullity of the sale for such fatal irregularities, because the original judgment against him was valid? Yet this is precisely what was held by the Circuit Judge, when he maintained the exception of *res judicata.* He decided, in effect, that the validity of the title to the property in question could not be inquired into, and evidence touching the validity of the sale would not be submitted to a jury, or considered by him, because the matter was *res judicata* by virtue of a *judgment* rendered before the sale took place.

The decision really goes to this extent—that if a judgment is valid, a sale under that judgment is valid.

It is insisted, therefore, that the Court *a qua* erred in maintaining the exception of *res judicata*, being No. 6, p. 9.

As to the effect of the monition pleaded as Exception No. 7, p. 9.

The Circuit Judge maintained this exception also, and ruled that "*it operates as a complete bar against all persons seeking to call in question the legality of the proceedings resulting in the sale of said premises, and is full and conclusive proof that the sale was made according to law.*"

If the opinion of the learned Judge is correct, then, without doubt, he was right in excluding all evidence touching the invalidity of the sale and title of defendant.

But we apprehend that the Circuit Judge gave a scope and effect to the monition far beyond what was ever before accorded to that proceeding.

1st. Let us inquire whether the monition proceedings were such as could bind any one.

Section 2371, Revised Statutes, declares that "it shall be the duty of the purchaser, if the purchase has been made within the city of New Orleans or the Parish of Orleans, *to publish three times* a monition, calling on all persons who can set up any right to the property, in consequence of *any irregularity or illegality in the appraisement and advertisement in time and manner of sale*, or for any other *defect* whatsoever, to show cause within thirty days from the day when the monition is first inserted in the public papers, why the sale so made should not be confirmed and homologated."

The monition was sued out on the 10th of March, 1864, p. 31. The Record shows a certificate, pp. 31–32: "That due publication, according to law, have been given in the New Orleans Bee, newspaper published in New Orleans, and that no opposition has been filed.' This certificate was signed by "C. T. Berens, C."

The clerk of the Court certifies the above to be a true and correct copy of the proof of publication of the monition, p. 33.

On this proof of publication of the monition, the District Judge confirmed and homologated the sale, p. 32.

There was no sufficient proof of publication according to law. "C. T. Berens, C." should have stated in his certificate, how often, and when the publication was made. He certified that "due publication, according to law," had been made, but he may have been ignorant of the requirements of the law. It is submitted that a judgment confirming the sale, without proof of advertisement, is of as little force and effect as a judgment *in personam*, without a citation of defendant would be. Such judgments may always be attacked collaterally.

The Monition Statute of Louisiana was first enacted in 1834, re-enacted in 1855, and is incorporated in the Revised Statutes, sections 2370 *et seq.*

The object of the law was to cure informalities, "*irregularities or illegalities* in the appraisement and advertisement, in time and manner of sale, or for any other *defect* whatsoever."

In the City Bank vs. Walden, 1 An. 47, C. J. Eustis, as the organ of the Court, said, the Monition Act of 1834, "was passed to protect *bona fide* purchasers at judicial sales, from litigation concerning *matters of form.*" "We do not understand the operation of this act *to extend beyond matters of form.*"

In Gernon vs. Handlin, 19 Ann. 26, the Court said: "The act of 1855 applies to informalities in auction or judicial sales, and not to radical defects in the proceedings."

In Robert vs. Brown, 14 An. 598, the Court said: "We are of the opinion that the act of 1834, re-enacted in 1855, does not cure the total want of authority to ~~sue~~ sell, but merely informalities and irregularities in the execution of the decree, or other sufficient authority to ~~sue~~ sell."

McCluskey vs. Webb, 4 Robinson, 202.

Brooks vs. Wortman, 22 An. 492.

Jackson vs. Ludeling, 21 Wall.

But the monition act itself declares Sec. 2377, Rev. Stat. of Louisiana, that it shall not be taken or understood to render valid any sale in virtue of any judgment, when *the party in the case was not duly cited to make defence.*

The Court cannot fail to observe the peculiar phraseology of this exception. The import of this language has never been decided in the Louisiana Courts, and this Court is now called upon to construe the above proviso, and to declare what the Law-giver meant when he said that the monition should *not be taken or understood*, to render valid any sale *made in virtue of any judgment*, when the party in the case had not been *duly cited to make defence.*

If the act had declared that the monition should only affect *parties to the judgment,* then, any one adjudged to have been a party by a constructive or substituted or statutory citation, might, with some propriety, have been held to be bound.

But when the act goes further, and declares that the "party" in the case must have been *duly cited to make defence,* otherwise the monition shall have no effect as to him, it seems that the conclusion is irresistible, that the Legislature meant that the monition should only affect parties who had been *personally* cited to make their defence.

In this case, we find, page 24, that the defendant in the suit of Samory vs. Montgomery, was absent from the State. *He* could not be cited. A *curator ad hoc* was appointed to represent him. The defendant being an absent belligerent, the *curator* could not, of course, confer with him or learn the grounds of his defence—could not make his defence.

In this case it is alleged that at the time of the pretended seizure and sale of the property in question, it was in the possession of the United States, as "abandoned property," and could not therefore be taken in execution. It is further alleged that there was no levy, or seizure of the property by the sheriff. This was proved on the first trial by the certificates of the recorder of mortgages, in whose office such seizure are required to be recorded. Revised Statutes, 1870, 3183, 4-5-6. These facts would have been established again had the

Judge permitted the case to go to trial before the jury.

By the law of Louisiana. *A purchaser at a sheriff's sale acquires no valid title when there has been no valid seizure and notice.*

Stockton vs. Downey, 6 An. 581; 24 An. 263; 11 An. 762; 2 An. 338.

The monition act was never intended to make a sale valid, which was absolutely null and void. The total want of seizure or levy, is not a *defective seizure* merely. It is not a merely *informal or irregular seizure.*

Without a possession of the property actual or statutory, the sheriff had no authority to sell, and the sale was a nullity, and conferred no title, and the monition could not cure it.

Smith vs. Cockrell, 6th Wallace.

The only remaining question presented for the consideration of the Court is this: Was the judgment of Samory vs. Montgomery, marked Rec. A., p. 21, a valid judgment? If not, of course the sale under execution, which issued on that judgment, was void, and conferred no title on the purchaser.

This judgment was rendered by a New Orleans Court in 1863, during the war. New Orleans was at the time occupied by the Federal forces, and had been excepted by the President's Proclamation, as not being within the rebellious portion of the State of Louisiana. The plaintiff in the suit was a resident of the city.

The defendant was absent at the time—within the Confederate lines. No citation was served upon him. He was only *represented* by a *curator ad hoc*, appointed by the Court.

On the 16th of August, 1861, the President of the United States, issued his non-intercourse proclamation. This proclamation prohibited all intercourse between the belligerents. The proclamation was but declarative of the laws of war.

In the great case of Griswold vs. Waddington, 16th Johnson, Chancellor Kent, said: "There is no authority in law, whether that law be National, Maritime or Municipal, for any kind of private, voluntary, *unlicensed business communication, or intercourse with an enemy.* It is all noxious, and in a greater or less degree it is criminal. *All kinds of intercourse* except that which is hostile, is illegal. The law has put the sting of disability into every kind of voluntary communication and contract with an enemy. There is wisdom, policy, patriotism and safety in this principle, and every relaxation of it tends to corrupt the allegiance of the citizen and prolong the calamities of war."

This case is replete with authorities to the effect that war prohibits all contracts, dealings or communication between enemies—it dissolves partnerships—abrogates mandates or agencies, and in a word, renders "illegal all intercourse except that which is hostile."

Now, in view of these principles, how can the judgment of the State Court, rendered without citation of the defendant, and upon service on a *curator ad hoc* appointed by the Court to "*represent*" the absent belligerent, have any force whatever. It has frequently been held by the Supreme Court that the late rebellion was a "public war," so far as intercourse or communication between the loyal and disloyal States were concerned—and that no commanding General—no one but the President was authorized to license any communication. "It was unlawful for the debtor to pay, or the creditor to receive payment."

Courts of the United States will always enforce the laws of the United States, regardless of State decisions. This was done in the case of Dean vs. Nelson, 10th Wall. 158, in which it was decided that a judgment of the State Court was inoperative and void, for want of citation Hence it is urged, that the judgment of the State Court was not voidable only, but absolutely void, in the absence of a citation—and that as ~~a~~ the judgment rests solely upon a service made upon a person appointed by the Court *to represent the defendant*, and as no one could legally represent the absent belligerent, in view of the President's proclamation of August 16th, 1861, the judgment of the State Court, ignoring that proclamation, and declaring that its appointee might legally represent the defendant, as attorney or agent, is without any effect whatever, and the plea of *res judicata* cannot avail to authorize the Courts of the State to overr idethe laws of the United States.

It is contended that the case of Ludlow vs. Ramsay, sustains the defence in this case. The cases are widely different. In Ludlow's case, there was a proceeding *in rem*, by attachment. *A newspaper publication* was under the law a service of citation, and the defendant was bound by the law, wherever he might be, to take notice of the advertisement In that case no attorney or *curator ad hoc* was appointed to *represent* the defendant, for none such could legally be appointed. In that case, the ruling in Dean vs. Nelson, was modified, because of the proclamation of the President of December 8th, 1863, and the Court says: "Why did not the defendant return?—that he was invited by the proclamation of December 8th, 1863, to do so." *In this case the defendant could not return because the proclamation was issued on the same day at Washington, on which judgment was rendered against him in New Orleans.*

The principles enunciated, and the authorities cited in the case of Pennoyer vs. Neff, decided by this Court, in February 1878, are directly applicable to this case and sustain our position that the judgment of Samory vs. Montgomery, under which the sale of the property sued for, took place, is null and void.

It has been said that Montgomery voluntarily left his residence to go into the service of the Confederate States in 1861, whilst Nelson was expelled from the Union lines, and a distinction between these cases was attempted. But which was the greater rebel? He who voluntarily left his home while it was in the undisturbed control of the Confederate Government, and was unable to return—or another, like Nelson, who after his home had been captured by the Federal Army, and was permanently occupied by the Union forces; yet proved to be of such obstinately rebellious and dangerous proclivities and conduct, that the commanding general found it necessary to banish and send him beyond the Union lines?

It is urged, therefore:

1. That the personal judgment of Samory vs. Montgomery, under which the execution sale of the property

in question took place, is null and void, for want of a legal citation of defendant.

2. That if that judgment be held to be valid—that still the sale under that judgment was void, because the property at the time was in the possession of the United States, as abandoned property, and the sheriff could not, therefore, take it in execution—and because the property was never, in fact, in possession of the sheriff, either by an actual or constructive seizure.

3. That the judgment of Samory vs. Montgomery, if valid, could not constitute *res judicata* as to the nullity of a sale subsequent to, and under that judgment, the validity of the sale not being involved in that judgment.

4. That the sale of the property, without any seizure by the sheriff, being a radical nullity and not a mere informality, was not cured by the monition sued out by Samory, and homologated by the Court.

5. That the monition published during the war could not legally have any binding force against an absentee from the State, as this would have the effect of depriving one of legal rights, without a legal adjudication thereon, without citation, and without due process of law.

6. That the Monition Act of Louisiana expressly declares that "it should not be taken or understood to render valid any sale made in virtue of a judgment *when the party cast was not duly cited to make defense.*"

In this case, Montgomery, the party cast, was not cited.

It is submitted that the authorities above cited sustain these several propositions.

All the equities of this case are with the plaintiff.

Samory, the defendant, bought under his execution property for about $17,000, which was worth from $40,000 to $50,000, and which rented for $5,000 per annum. See statement of facts, found on the first trial, p. 13.

On the return of Montgomery to New Orleans, in 1865, he offered to pay to defendant *in gold* (then at a high premium) the mortgage debt, principal, interest and costs, if the latter would give back the property. This offer was declined. See statement.

The consequences of Montgomery's engaging in the rebellion should have ceased with his death, and not be visited on his minor child. Nor should Samory be allowed to enjoy the fruits of his practical confiscation of this property, unless the law is clearly with him, which I submit is not the case.

It is respectfully asked that the decision of the Circuit Court be reversed, and that there be judgment for plaintiff.

THOMAS HUNTON,
Attorney for plaintiff in error.

UNITED STATES SUPREME COURT.

No. 178.

MARY ROSELLA MONTGOMERY,

(SUING THROUGH ROSELLA MONTGOMERY, TUTRIX, ETC.)

vs.

HENRY SAMORY.

Brief for Defendant in Error, Henry Samory.

Graham, Brief Printer, 127 Gravier st.

UNITED STATES SUPREME COURT.

No. 178.

MARY ROSELLA MONTGOMERY,

(SUING THROUGH ROSELLA MONTGOMERY, TUTRIX, ETC.)

vs.

HENRY SAMORY.

Brief for Defendant in Error, Henry Samory.

STATEMENT OF FACTS.

On the 28th of May, 1861, and 13th of January, 1862, Samuel McC. Montgomery, the father of the plaintiff in error, executed mortgages on certain property in the city of New Orleans to secure the payment of promissory notes made by him, and on the 10th November, 1863, the notes being due and unpaid, the defendant Samory sued out executory process from the Third District Court of New Orleans on the notes and acts of mortgage, under which the mortgaged property was adjudicated by the sheriff to him.

See record of suit Henry Samory vs. Samuel McC. Montgomery attached to Bill of Exceptions, Rec. p. 21.

See Code of Practice of Louisiana, Articles 734, et seq.

In that suit, the debtor, Montgomery, being absent, the fact being made to appear by the sheriff's return, the plaintiff therein caused a curator ad hoc to be appointed to represent the absent defendant, and contradictorily with this curator the proceedings for the seizure and sale of the property were carried on. This was in accordance with the mode of procedure, prescribed by the law in Louisiana.

See Civil Code of Louisiana, Art. 56.

See Code of Practice, Art. 116.

Sheriff's Return, p. 23; Petition and Order and Service, p. 24.

Thayer vs. Tudor, 2d Louisiana Annual, p. 1010.

State vs. Judge Parish Court, 15 Louisiana, 81.

Record of Samory vs. Montgomery, opinion attached to Bill of Exceptions, Rec. p. 28.

On the 15th July, 1865, Montgomery, the debtor, whose property has been sold under the writ of seizure and sale issued against him, applied for and obtained an appeal to the Supreme Court of Louisiana from the judgment directing the seizure and sale to issue. When this appeal was applied for, more than one year had elapsed since the rendition of the judgment appealed from, and the appeal was obtained under the article of the Code of Practice, which limiting appeals to within one year from the rendition of the judgment, makes an exception in favor of absentees, to whom a delay of two years is granted. In the petition of appeal it is alleged that the judgment from which the appeal is asked was rendered against the plaintiff "without his having been previously cited and without there having been any *contestatio litis*," and that by law he has the right to appeal.

Code of Practice, Art. 593.

See petition of appeal, Rec., p. 26.

In executory proceedings, which was the form of the suit of Samory vs. Montgomery, the *contestatio litis* is formed by issuing and serving on the debtor the notice specified in Article 734–5. In executory process this notice takes the place of citation, and is all that is requisite to bring the defendant before the Court.

See Dupuy vs. Bemiss, 2d La. Ann. 514.

McDonogh vs. Frost, 1st Robinson's Louisiana Rep., p. 514.

Nash vs. Johnson, 9th La. Rep., p. 13.

The *contestatio litis* sought to be attacked and put at issue by the appeal, was the competency of the service on the curator ad hoc, to bring before the Court the absent defendant, Montgomery. The issue on that appeal necessarily was whether Montgomery was cited, that is by service of notice on the curator appointed to represent him. And on this issue, Montgomery first, and then his heir—the plaintiff in error here—Montgomery having died pending the appeal stood confronted before the Supreme Court of Louisiana. Its judgment was pronounced in favor of the citation, a decree rendered contradictorily with the parties in interest now before the Court. The Supreme Court elaborately reviewed the jurisprudence of Louisiana, in reference to the mode of bringing absentees before the Courts, especially in foreclosures of mortgages: the decision maintained the entire validity of the appointment of the curator ad hoc to represent the defendant, Montgomery, and affirmed the judgment appealed from.

See order of Supreme Court making tutrix party to appeal. Record pp. 27–8.

See opinion and decree of Supreme Court of Louisiana in Samory vs. Montgomery, attached to Bill of Exceptions, Rec. p. 28.

After the judicial sale of the property to Samory, under the laws of Louisiana, enacted to secure the purchasers of property at judicial sales. he applied for a monition to protect his title thus acquired. In due course of proceeding, he obtained judgment confirming and homologating the sale to him, the effect of which as declared in the law itself, was to constitute *res judicata*, operating as a complete bar against all persons whether of age or minors, whether present or absent, who might thereafter claim the property sold in consequence of any illegality or informality in the proceedings of whether before or after judgment; the judgment to be received and considered as full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced in the interests of parties duly represented. Montgomery, although he appealed from the judgment ordering the seizure and sale to issue, never appealed from the judgment of the monition, and that judgment became final.

See application for monition and judgment thereon, attached to Bill of Exceptions, Rec., pp. 30 to 33.

Appeal, Rec., p. 26.

See Revised Statutes of Louisiana, verbo Monition, p. 469, sec. 2370 et seq.

The judgment on the monition furnished to the purchaser an estoppel against all complaints from whatever source, based on any and all alleged illegal informalities or illegalities in the judicial proceedings, which led to and terminated in the sheriff's sale; whether as the law expresses it "before or after judgment," except that the operation of the judgment on the monition is declared by the law not to extend to make valid any sale made in virtue of a judgment when the party was not duly cited. R. S., sec. 2377. But in all other respects, i. e., except the want of citation, the judgment on the monition confirmed the title of the defendant in error here, acquired by him at the judicial sale, and precluded any attack upon it on any ground of any illegality or informality connected with the judicial proceedings and sheriff's sale under which he acquired title. And in respect to the citation itself or notice required to be given to the debtor, the defendant in error here, stood protected by the final decree of the Supreme Court of Louisiana affirming contradictorily with Montgomery, the debtor, and his heir the plaintiff in error here, the validity of that citation. Thus the judgment of the Supreme Court on the issue of the citation, and the final judgment of the monition furnished the defendant in error, Samory, a complete protection against any attack on his title based on the sheriff's sale to him; and he stood vested with this protection when the litigation was begun, which is now here on the writ of error sued out by plaintiff from the judgment of the Circuit Court, against him.

After all this on the 29th of March, 1871, the plaintiff in error sued the defendant in error, in the United States Circuit Court for the Fifth Circuit and District of Louisiana, claiming the property purchased by the defendant at the sheriff's sale.

The petition alleged that no personal service of citation in the suit of Samory vs. Montgomery, was made on the defendant therein: that the appointment of the curator ad hoc in that suit was in violation of the authority of the United States and the proclamation of the President of the United States: that in 1861 the plaintiff had engaged in rebellion against the United States, and joined a military company in the service of the Confederate States: that the appointment of the curator to represent the defendant in said suit, who was in a portion of the Confederate States in rebellion, was in violation of the authority of the United States, and the proclamation of the President, and the petition charged that the judgment in said suit, rendered in the absence of any citation, was void and null, and that the sale made under that judgment conferred no title on the defendant in error, Samory. The petition also averred that no notice of seizure in said suit was ever given Montgomery, the defendant therein. The petition concluded, with a prayer for judgment, that the plaintiff in error here, be decreed to be the owner of the property and that his right to sue for rents and profits be reserved. It will be perceived, that in this suit, the plaintiff in error, seeks to controvert the precise issue, the validity of the citation, finally adjudicated by the Supreme Court of Louisiana, on the appeal of Montgomery and of his heir, the plaintiff here.

See petition, Rec. p. 1.

To this petition the defendant in error, pleaded the peremptory exception of *res judicata* based upon the judgment of the Supreme Court, sustaining the validity of the citation to the curator ad hoc, and the peremptory exception of *res judicata* based upon the judgment on the monition, confirming and homologating the sheriff's sale to the defendant, as operating a complete bar against all persons whether of age or not, and furnishing conclusive proof that the sale was duly made according to law. The defendant also pleaded the prescription of five years in bar of plaintiff's action and other defences.

See peremptory exceptions, Rec. p. 9. Answer, p. 5.

On the first trial the jury being waived there was judgment in favor of plaintiff in error, but a new trial was granted on the application of defendant.

See Record, pp. 11, 12, 14.

Thereupon the plaintiff amended his original petition and alleged, that the property the subject of the suit, was at the date of the sheriff's sale in the possession of the United States, as abandoned property. The defendant reiterated the former exceptions and not waiving them but insisting thereon, in the event that such exceptions were overruled, then reiterating the previous defences, denied the allegations in the amended answer.

See Record, pp. 14, 16, 17.

On the new trial, the judgment of the Court was in favor of the defendant, maintaining the peremptory exceptions of *res judicata*, based upon the judgment of the Supreme Court, affirming the validity of the citation, and maintaining the judgment on the monition, as a complete bar to the action, and as furnishing conclusive proof that the sale was made according to law.

See Judgment, Record, pp. 18, 33, 34.

From that judgment the plaintiff in error, prosecutes the writ of error to this Court.

Record, pp. 34, 35.

ARGUMENT.

The plaintiff's bills of exception are three in number.

Record, pp. 19, 20.

The first exception is taken to the ruling of the Court, that the peremptory exceptions of *res judicata*, based upon the judgment of the Supreme Court, in the suit of Henry Samory vs. Sam'l McC. Montgomery, and upon the monition and judgment thereon homologating and confirming the sheriff's sale, should be determined by the Court, and overruling the defendant's application that the whole case should be tried by the jury: the bill of exceptions stating, that when the case was called, the defendant in error, moved the Court to decide the exceptions.

The ruling of the Court was manifestly correct. The issues raised by the peremptory exceptions, were wholly dependent for their solution upon judicial records and their legal effect. There was no issue of fact, to be submitted to the jury. The petition of the plaintiff in error, disclosed his cause of action to be, that the judgment in the suit of Henry Samory vs. Sam'l McC. Montgomery was based upon a citation served upon the curator *ad hoc*, appointed to represent the absent defendant, which appointment the plaintiff charged was illegal; that the sheriff's sale, based on that judgment, was null and void, and the plaintiff's petition referred to the suit, in which this appointment was made under the judgment recovered in which, the sheriff's sale was made.

The record of that suit, showed the appeal taken therein by the defendant, Montgomery, the joining in that appeal by his heir, the plaintiff in error here, and it exhibited the judgment of the Supreme Court, affirming the validity of the citation. Whether the judgment on the appeal did not conclude the plaintiff in error, from reviving that same issue, the validity of the citation, in the present action, was purely a question of law, arising wholly upon the judicial record. It would have been idle to refer such an issue to the jury. It demanded and required the adjudication of the Court, to the exclusion of the jury. If that judgment on the appeal constituted *res judicata*, in respect to the validity of the citation, there was no issue of fact or of law left on that branch of the case. What was the legal effect of that judgment, the identity of the parties and of the issue being exhibited in the pleadings and by the records, was purely a question for the Court, and so the Court ruled and in respect to the correctness of that ruling judgment of the Supreme Court, there manifestly can be no question.

Then again the validity of the citation through a curator *ad hoc*, according to the law of Louisiana, was apparent on the face of the judicial record. In no point of view could the plaintiff in error complain of the legal proceeding of the defendant in foreclosing his mortgage, for the petition of the plaintiff in error averred that the debtor, Montgomery, was voluntarily absent and engaged in the rebellion, the allegation being that in 1861 he joined a military organization in hostility to the United States, and from 1861 remained until June, 1865, in the portion of the Confederate States declared in rebellion. Petition, page 1. The record showed the appointment of a curator *ad hoc*, according to the law of Louisiana; the allegations in the petition disclosed a proper basis for that appointment, if it was requisite to go beyond the *res judicata* based on the judgment.

See Ludlow vs. Rumsey, 11 Wallace, 81.

McQuiddy vs. Ware, 20 Wall., p. 14.

Masterson vs. Howard, 18 Wall., 99.

See Ramsay vs. Livingston, 5th Louisiana, New Series, p. 15.

Thayer vs. Tardor, 2d La. An., p. 1010.

So, too, the plea of *res judicata*, based upon the monition, raised an issue wholly dependent for its solution upon the judicial records. The petition of the plaintiff in this suit shows the property to be the same, that was the subject of the monition. See plaintiff's petition, Rec. 1; Monition and Judgment Rec. pp. 30, 31, 32. What effect the judgment on the monition, was to have with respect to the allegations in the petition and supplemental petition, that no notice of seizure was given, (Record, p. 2), and that the property was not susceptible of seizure and was not seized, (supplemental petition, pp. 14, 15), was entirely dependent upon the construction of the statute, which declares, that the judgment on the monition confirming and homologating the sale, shall have the force of *res judicata* operating a complete bar, against al persons, whether of age or minors, who might thereafter claim the property sold in consequence of all illegality or informality, in the proceeding whether before or after judgment, and furnishing conclusive and full proof that the sale was made according to law. Revised Statutes of La., §§ 2370, 2376.

There could be no controversy that the plaintiff claimed the property purchased by the defendant, Samory, at the sheriff's sale, and that the plaintiff claimed it solely on three grounds, that there was no citation, that there was no notice of seizure, and that in fact there was no seizure. That was the whole case. See petition and supplemental petition, Rec. p. 1, p. 14. There could be no question that the same property thus purchased at sheriff's sale by defendant, as stated in the plaintiff's petition, had been the subject of the monition proceeding, and that the judgment had been rendered confirming the sale, in the mode prescribed by the State. And whether this judgment on the monition, did not conclude the plaintiff in respect to the allegations in his petition, denying notice of seizure and the fact of seizure, required the construction of the monition law, and it required nothing else· It was not for the jury to determine the scope and legal effect of the judgment, on the monition. It was not for them to decide whether the judgment on the monition, did not furnish conclusive proof that notice of seizure was given and that the seizure was made, and that the plaintiff was concluded in respect to these grounds of action. That question of construction was for the Court and not for the jury. And so the Court ruled.

The peremptory exceptions of the defendant were founded upon the law, and necessarily demanded the action of the Court. Such exceptions "without going into the merits show that the plaintiff cannot maintain his action either because it is prescribed or that the cause of action has been destroyed or extinguished." Under the law of Louisiana such exceptions address themselves to the Court, and it is the right of the party who relies on such defences, to have them tried by the Court. The law in Louisiana, upon this subject harmonizes with the general rule, that issues purely of law are to be solved by the Court, and not by the jury. The defendant who relies on the peremptory exception of *res judicata* waives it by proceeding to trial on the merits, without insisting upon the determination of his exception by the Court. It was therefore the right of the defendant in error here, to have his exceptions acted upon by the Court.

See Louisiana Code of Practice, Arts. 345, 346.
Pearce vs. Frantum, 16th La. Reports, p. 418.
Francis vs. Lurine, 26 An., 311.
Cure vs. Porte, 18 La. An., p. 206.
Purcell vs. Graves, 15 An., 188.
Kittredge vs. Race, 2d Otto, p. 121.

The second bill of exceptions was taken by the plaintiff in error, to the decision of the Court on the plea of *res judicata* based upon the monition and the judgment thereon. The Court held that the judgment confirming the sale "had the effect in law of curing the alleged defect in Samory's title, resulting from the want of seizure by the sheriff of the property sold, and had the effect of *res judicata* and operated as a bar, against any claim of plaintiff, based upon the alleged want of seizure of the property, and concluded the plaintiff from offering any evidence to support his allegation of the want of seizure and the Court maintained the said exception of *res judicata*," to which ruling plaintiff excepted.

See Bill of Exceptions No. 2, Record p. 20.

The law itself, couched as it is in plain terms, that the judgment "shall have the force of *res judicata*, operating as a complete bar against all persons, whether of age or minors, who might thereafter claim the property sold, in consequence of all illegality or informality in the proceeding, whether before or after judgment, and that the judgment of homologation shall, in all cases, be received and considered as full and conclusive proof, that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced in the interest of parties duly represented," is in itself a sufficient support to the ruling of the Court. The ruling simply interprets the law according to its terms and its obvious spirit and intent. Revised Statutes of Louisiana, sections 2371, 2376.

The object of the law in respect to monitions was to protect the titles of purchasers at judicial sales, by furnishing a mode of proof that the legal requisites to the validity of such sales were complied with. In the interest of the defendant, the law exacted that his title should not be divested by the sheriff's sale, except in pursuance of a judgment regularly pronounced against him, and except by the observance of certain formalities and requisites in the execution of that judgment by the sale of his property. Thus, the law prescribed that certain notices should be given to him, that his property should be advertised a certain number of days, that the sheriff should seize, that the property should be appraised, etc. See Code of Practice, Arts. 643, 646, 648, 654. And the omission to observe these requisites furnished cause to annull the sale. See 1st Hennen's digest decision of Courts in La., p. 651, No. 3. In the absence of that full and conclusive proof of compliance with the requisites of judicial sales, afforded by the monition, proceeding and the judgment thereon, it might be difficult and often impracticable for a purchaser to make this proof. While the law gave full protection to the defendant, whose property was seized and sold, it was of equal importance that the rights of purchasers should be protected and the security of titles maintained. Hence the monition law. The law contemplated that when illegalities or informalities were alleged in the proceedings for the forced alienation of the debtor's property, that an opportunity should be afforded to make such objections. The monition is to be published calling upon all persons who can set up any right to the property, in consequence of informality in the order, decree or judgment under which the sale was made, or any irregularity or illegality in the appraisement and advertisement, in time and manner of sale, *or for any other defect whatsoever*, to show cause within a certain delay why the sale should not be confirmed. Revised Statutes, section 2371. But this opportunity afforded, it was enacted that the judgment confirming the sale, should conclude the debtor and every-one, whether present or absent, whether minors or of full age, from ever afterwards calling the judicial sale in question on account of any illegalities or informalities, either before or after judgment. Sec. 2376.

The law is exhaustive in its terms as to the effect of the judgment of monition. The judgment extends to all illegality or informality in the proceeding, whether before or after judgment, and cures all defects, if they existed. The law makes one exception which the judgment of confirmation does not reach. i. e., the want of citation; but the excepted defect only confirms the legislative intent, manifested by the terms employed, that saving the want of citation, all and every other informality or illegality, if such existed, connected with the judicial proceedings, down to and including the sheriff's sale, are covered and cured by the judgment on the monition, which is the full and conclusive proof that the sale was duly made according to law, in virtue of a lawful judgment or order.

The defects alleged in the plaintiff's petition, to annul the title of the defendant to the property acquired by him at the sheriff's sale, are that no notice of seizure was given, and that no seizure was made. Obviously, such defects, if they existed, are within the expression, "all illegality and informality in the proceeding, whether before or after judgment," used in the law, and as to such alleged defects, the judgment confirming the sale is to be accepted as full and conclusive proof, against the allegation, in respect to such defects. What warrant is there for any other interpretation? The law covers every illegality or informality in the proceeding. Lest the word informality might not be deemed sufficiently comprehensive, the law *ex industria* uses the terms all "informality or illegality." What are the informalities or illegalities in the proceeding with which the law is dealing? Manifestly, the acts required to be performed, in order to effect the sale of the debtor's property under execution, and detailed in the Code of Practice under the title of "the execution of judgments, directing the payment of sums of money," the omission of which affords ground to attack the sale.

See Code of Practice, articles 641 *et seq.*, 745.

One of these requisites is that the sheriff shall execute the writ by seizing the property of the debtor. (Code of Practice, art. 643.)

Another is that the sheriff shall give the debtor notice of this seizure (Code of Practice, article 654), and these are the only requisites concerned in this case, except citation. If the sheriff receiving the writ does not seize, his omission of duty is either an informality or illegality. If he seizes and omits the notice, the same terms, informality or illegality, apply to that omission. The descriptive terms, illegality or informality, clearly apply to and cover the defects in the proceedings, alleged in the petition. No other terms could be employed, better fitted to describe the defects complained of, and no other illegalities or informalities can be suggested more clearly and directly, within the provisions and terms of the law. The legislature framed the monition law, to quiet titles. It designed to furnish to the purchasers at sheriff's sales a form of proof to be obtained after due notice to the debtor, which should be received to establish conclusively, with the single exception made by the law, of want of citation, that the requisites to the validity of the sheriff's sale, has been fully complied with, and that the sale was made according to law. With such purpose manifestly in the view of the law maker, can any reason be suggested why the mode of proof, was to be designed to serve for certain requisites in the proceedings incident to the judicial sale, and not for others? What reason can be assigned for such a distinction? If the monition and judgment had been designed to furnish proof only of certain requisites, and not of others, in the proceedings previous to the sale and after citation, it would have been as well to have left the purchaser to the ordinary means of proof, when his title was assailed. Without palpable violence to its purpose and spirit, the law cannot thus be narrowed by construction. The words all illegality and informality, rendered more emphatic, if that were possible, by the sole exception of the want of citation, placed beyond the scope of the statute, by its express terms, are susceptible of but the one construction, ~~and~~ maintained in this case by the judgment of the Circuit Court.

It may be urged that the failure of the sheriff to seize the property, furnishes the cause to demand the nullity of the sheriff's sale. See Code of Practice, Art. 643, Kilborne vs. Frelsen, 22 An., 207; 24 An., 262, and other cases to same extent. This is not questioned. There is no occasion to controvert the law, expounded in those cases. In those cases the purchasers had not protected themselves by a monition, nor were they enabled to prove that the seizure had taken place. The judgment annulling the sale, was the necessary consequence. But those decisions have no bearing here. The question in this case is, whether the monition, and the judgment thereon, does not furnish the conclusive proof that the property, the subject of this litigation, was seized by the sheriff and taken into possession. The monition law deals with all informalities and illegalities in the proceeding, whether before or after judgment. The omission to seize, cannot be made more or less, or anything else, than an informality or illegality in the proceeding. The law maker uses the terms to describe every defect: if informality could be deemed insufficient to embrace the want of seizure, the term illegality supplies a significance, competent to embrace every possible defect in the proceeding. No possible construction or meaning that can be attached to the language of the law, will exempt the alleged failure to seize the property or to give notice from the scope of the terms employed, that the judgment is a complete bar to any attack for *all* informality or illegality, and that the sale was made according to law. The class of cases, in which sheriff's sales have been annulled, because there was no seizure, recognize that seizure precedes and is the accompaniment of the sheriff's offer to sell; i. e., that he must have the property in his possession by the seizure in order to sell it, or his sale will be illegal and null. A sale by him of property not seized, would not be a sale according to law. It would be the opposite. But the judgment on the monition, the law declares is to be received as full and conclusive proof, that the sale was duly made according to law. The expression according to law, carries with it the necessary implication, that the property was seized. The alleged failure to seize, is not only included in the *illegalities* and informalities which the judgment cures, but that it is so included, is made more emphatic by the terms, that the judgment makes full proof that the sale was made according to law. If then, the absence of seizure does annul the sale, the complete answer here is, that the judgment on the monition, is conclusive that the property was seized.

The monition law has been the subject of frequent adjudications in the Supreme Court of the State. In the early case of the State vs. Bermudez, 12th Louisiana R., p. 354, the Supreme Court of Louisiana decreed:

> "The act of 1834, is a remedial statute. The evil intended to be remedied, was that mass of litigation growing out of alleged informalities and nullities of judicial sales, which kept purchasers in the best faith, in constant dread of being harassed and disturbed, in proportion as the property acquired became more valuable, and the evidence of a strict compliance with

the forms of law, more difficult to obtain. It gives to purchasers a right by public monitions, to provoke an inquiry into the regularity of proceedings, which led to the alienation in question, or accords him an action in the nature of a jactitation of title against all persons, whose rights have been affected by the sale, before the same court under whose authority it was made. The judgment to be pronounced, affects no rights, except such as grew out of irregularities and nullities in the original proceeding; the purchaser acquires no new title, no new right, but only an exemption from future litigation on account of such informalities, after affording all parties interested an opportunity in a summary manner to contest the same matters which might afterwards become the subject of a suit; and the statute gives to the judgment of homologation to be pronounced on the monition, the form of the thing adjudged, only in relation to such nullities and informalities. It is true, the act does not expressly extend to sales which had taken place before its passage, but it gives to all purchasers at judicial sales, a right to apply for a monition, (without distinction,) and in giving it effect as a remedy in relation to a sale, which had already taken place, we do not think any fundamental principle is violated, any more than applying a new law of prescription to existing causes of action."

And again the Court proceeds:

"A fair opportunity is afforded to all persons interested to come forward, and make opposition; the monition stands in lieu of a citation, and a publication of the monition is a constructive notice. In our opinion, the remedy afforded by the statute, was intended to be co-extensive with the evil, and to afford the means of drying up, in a great measure, a fruitful source of litigation."

The Court in that case, it is true, was dealing with the question whether the monition act then recently adopted, extended to sales made before its passage, but the exposition of the scope of the law, which in the view of the Court extended to informalities and nullities in judicial proceedings occasioning "a mass of litigation," which it was the intention of the act to limit and prevent, deserves attention here. The Supreme Court characterized the act as a remedial statute, directed against the mass of litigation, arising from nullities and informalities. Its remedy consisted in a mode of proof, to cover all such nullities and informalities, and to conclude parties from averring the existence of such defects. Remedial statutes, deservedly receive a liberal construction. Where is the authority for that interpretation attempted to be maintained by the plaintiff in error, which seeks to exempt from and exclude from that full and conclusive proof, the statute extends to all illegality and informality, an alleged defect in the proceeding, which if it existed, is manifestly within the terms of the statute. What refinement of construction is that, which is to make out of alleged omissions of the sheriff to seize the property, or to give notice, anything else than illegalities or informalities, covered by the statute.

In Cordeviolle vs. Hosmer, 16th Louisiana Reports, p. 592, the effort was to exclude a privileged claim on the property, superior to that of the plaintiff, under whose writ the property was sold. The Court properly held that the monition had no such effect. But the language of the Court, is quite significant in its application here. In the present case, said the Court, the plaintiffs "do not complain that the judgment was improperly obtained, nor of any irregularity in the issuing or the execution of the writ of *fieri facias*." Such a complaint of an irregularity in the issuing or execution of the writ, the Court evidently deemed within the operation of the monition law. Is not the omission to seize the property obviously an irregularity in the execution of the writ, designed to be cured by the monition?

The monition was also construed in D'Arenbourg vs. Chauvin & Levois, 9 An. 68. The Court observed that the proceedings under the moniticn cured all irregularities of the sale, if any existed. See also 1st Louisiana An., p. 46.

In the case of Willes vs. Nicholson, 24 An., 545, the Supreme Court maintained that the judgment on the monition protected the title, where the ground to annul the sale was the want of authority on the sheriff to make the sale, a decision not weakened by the dissenting opinion in the case. The decision is based upon what it is submitted is the obvious purpose and meaning of the law. The dissenting opinion, seeks to make a distinction in respect to the illegalities covered by the monition, which is plainly repugnant to the terms and spirit of the law. The language of the opinion of the Court is an unanswerable exposition of the scope and purpose of the law. The Court says:

"Whatever may have been heretofore said, or may now be said in regard to the effect of a judgment on a monition upon what may be termed radical defects, we think it clear that the judgment on the application of Gilmer for a monition in this instance is a bar to this action. It was clearly the duty of the plaintiff herein, who does not allege a want of citation in the suit against her, to make herself a party to that proceeding, and urge all the grounds of opposition which she might or could have. She was manifestly within the category of persons affected by the notices required to be given and concluded by the judgment in said proceedings. Under the language of the law the thirty days notice applies to 'all persons who can set up any right to the property, in consequence of any informality in the order, decree or judgment of the Court under which the sale was made, or any irregularity or illegality in the appraisement and advertisement in time and manner of sale, or for any other defect whatsoever.' The defects urged by the plaintiff are the want of authority in the sheriff for specified reasons and the want of a sufficient description and identification of the property. We think there can be no doubt that there are defects of and within the proceedings resulting in the sale, which should have been urged by plaintiff in opposition to the monition. The presumption of law is that the sheriff had in his hands the writ of execution, which was his full, legal authority to make the sale, and if that authority was revoked or suspended this fact, as well as any defect of description, should have been set up and established in the monition proceedings."

And this Court has construed the monition law in Moncure vs. Zunts, 11 Wall. 416; Jeter vs. Hewitt, 22 How., p. 362; Jackson vs. Ludeling, 21 Wall., 616, and although the particular defects alleged here of the want of seizure and omission of notice were not involved in the cases before this Court, in which these adjudications were made, still the reasoning of the Court in the cases cited sustain the monition law as covering informalities and illegalities in the proceedings. The language of the Court in 21 Wallace, 616, was that the judgment of confirmation is conclusive upon the world, that there have been no fatal informalities or irregularities or defects.

"That act authorizes purchasers at a sheriff's sale to apply for a monition to all persons interested who can set up any right, title, or claim to the property described in consequence of any *informality* in the order or decree, or judgment of the Court under which the sale was made, or any *irregularity or illegality in the appointment and advertisement in time or manner of sale*, or for any other defect whatsoever, to show cause why the sale should not be confirmed and homologated. If no cause be shown, the judgment of confirmation in the case is conclusive upon the world. But conclusive of what? Conclusive that there have been no fatal informalities, or irregularities, or defects; we think of nothing more. The act has relation to mistakes or omissions of the officers of the law."

The efficacy of the monition in this last case was denied, because fraud was charged in the conduct of the sale. The elements which rendered the monition ineffective were extraneous to the proceedings, and in the opinion of this Court vitiated those proceedings wholly irrespective of the monition law. But the exposition given in that case by this Court, that the monition is conclusive upon the world; that there have been no fatal informalities or irregularities or defects, upholds the judgment of the Circuit Court in this case with a vigor of expression and accuracy of argument that admits of no addition. The law itself is clear enough. The jurisprudence established by this Court, and the Supreme Court of Louisiana accords with the manifest intent and purpose of the law, and conclusively sustains the ruling of the Circuit Court upon this branch of the case. But if any addition can be made to that which is so well established, it is furnished by the decision of this Court in Pike vs. Evans, 4 Otto, p. 6. In that case this Court construed the prescription established by the laws of Louisiana, which provides "that all informalities connected with or growing out of any public sale shall be prescribed against by those claiming under such sale, after the lapse of five years, either against minors, men or women, or interdicted persons." See Acts 1834, p. , Revised Statutes of Louisiana, § 3392.

This prescription itself would have been a perfect defence in this case, for the defendant held under a sheriff's title, and the judgment of monition besides. But the judgment on the monition was sufficient. The Court held in the case from 4th Otto, that the want of seizure in that case, one of the grounds here was an informality cured by the possession of five years. 4th Otto, p. 10. The same construction applies to the same term used in the monition law. It is an informality cured by the monition. The decision is conclusive. The monition law, is stronger against the plaintiff here, than the prescription statute, for the monition uses the expression all "informality or illegality."

It is to be observed too, that in the plaintiff's original petition, it is alleged that the sheriff had sold the property under an execution or order of sale, that the judgment on which the sale was made was null for want of citation, and he also alleged that no notice of seizure of the property was ever given him. In that petition the fact of seizure far from being controverted must be deemed to be conceded. It is the allegation that no notice of seizure was ever given him, that is relied on. It is in his supplemental petition that the allegation ~~seems to be~~ is introduced that no seizure was made, and that no seizure was possible. It is submitted that the plaintiff cannot dispute the seizure under his pleadings. See petition, p. 1; supplemental petition, p. 14; exception, p. 15. The undoubted estoppel on this point found in the monition and judgment thereon, if it were at all essential, would find support in the plaintiff's pleadings. Rec., p. 15.

The three grounds on which the plaintiff demands the nullity of the sale. i. e., the want of citation, the alleged omission to give notice of the seizure, and the alleged want ot seizure of the property, were thus completely answered by the defences, of *res judicata* based on the final decree of the Supreme Court that the citation was valid, and by the plea of *res judicata* based on the monition and judgment thereon, constituting the conclusive proof that the seizure was made and notice was given, and operating as a bar to the action, plaintiff's action, based on the alleged want of seizure and notice. The judgment of the Circuit Court sustaining these pleas was manifestly correct, and disposed of the plaintiff's case.

The plaintiff reserved no bill to the ruling of the Court on the plea of *res judicata*, based on the judgment of the Supreme Court affirming the validity of the citation. Judgment, Rec., pp. 19, 33; Bills, pp. 19, 20, 21.

There is a third bill of exception. Rec., p. 20. The bill states the plaintiff moved the Court to decide that the peremptory exception of *res judicata*, based upon the monition and judgment thereon, as pleaded in bar of plaintiff's action, was an admission in law for the purposes of the trial of the exceptions of the truth of the plaintiff's allegations that there was no valid seizure by the sheriff or valid sale of the property.

Manifestly, the peremptory exception in effect affirmed the validity of the sale, and that every requisite to make that sale valid had been complied with, based as the exception was on a judgment which under the law, was the conclusive proof that the sale was duly made according to law, and which was a bar to the allegation of plaintiff and the action based thereon.

The title of the defendant had been in effect adjudged to be good and valid by the competent tribanals in Louisiana, before this litigation begun. The citation had been determined by the final judgment of the Supreme Court, to be sufficient on the appeal of the plaintiff in error. The final judgment on the monition had affirmed the regularity and legality of the sale, and was a perfect estoppel to the grounds alleged in the petition of want of seizure and the omission to give notice. The courts of the United States have no jurisdiction to review or reverse decisions thus made by the courts of Louisiana.

Voorhees vs. Bank of United States, 10 Peters, 440.

Cornett vs. Williams, 20 Wall., 249.

The judgment of the Circuit Court should be affirmed.

Henry C Miller
of counsel for
Deft in Err

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 178.

MARY R. MONTGOMERY,
BY
ROSELLA MONTGOMERY, *Tutrix*,
vs.
HENRY SAMORY.

P. PHILLIPS,
for Defendant in Error.

January 28, 1879.

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Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 178.

MARY R. MONTGOMERY,
BY
ROSELLA MONTGOMERY, *Tutrix*,
vs.
HENRY SAMORY.

Brief of P. Phillips, for Defendant in Error.

Samuel M. Montgomery, being indebted to defendant in error in a large sum of money, as evidenced by his promissory notes, executed before a notary his two mortgages of certain real estate in the city of New Orleans, bearing date the 28 May, 1861, and the 13 January, 1862.

Under the law of Louisiana these mortgages imported a confession of judgment for the amount thus secured.

Default having been made, Samory filed his petition, No. 17,501, in the 3d district court, praying that Montgomery may be cited to answer, and that he be condemned to pay the amount claimed, with mortgage privilege, upon the property described. p. 21.

The return upon the citation was "not found, and that Montgomery was out of the State."

Thereupon, a supplemental petition was filed, reciting this return of the sheriff, and praying that a *curator ad hoc* be appointed and a citation served on him. p. 24.

In accordance with this prayer, the court appointed I. G. Murtagh, on whom the citation was duly served, and his answer was filed in legal form.

Judgment was entered for plaintiff on 12 December, 1863, in accordance with the prayer of the petition. p. 26.

In July, 1865, Montgomery, by W. H. Hunt, his attorney, filed his petition, praying for a devolutive appeal, complaining that the judgment had been rendered against him "without having been previously cited as the law directs." This appeal was allowed November, 1865. p. 27.

The case being now in the Supreme Court, W. H. Hunt, on 2 May, 1866, suggested the death of Montgomery, and that Rosella, his widow, had been appointed natural tutrix of her minor child, Mary Rosella; and on this suggestion Rosella was made party to the appeal. p. 28.

On 15 June, 1867, the Supreme Court affirmed the judgment. The opinion of the court being certified on p. 28.

Pending the appeal which was devolutive only, the property was sold, under the judgment and execution rendered by the court below, and Samory became the purchaser.

On 10 March, 1864, and while the appeal was still undetermined, Samory applied to said district court for a monition under the act of 15 March, 1855. p. 30.

Publication, as provided by law, was duly made, and such proceedings had thereon, as terminated in a judgment on 15 June, 1864, "that the said sale be confirmed and homologated according to law." p. 35.

Near seven years, subsequently, to wit, on 29 March, 1871, Rosella, as tutrix, filed her petition in the Circuit Court of the United States, praying for a decree that "the title to the property acquired by Samory by the purchase aforesaid is null and void."

The grounds for this are found in the statement of the petition and supplement thereto, to wit:

That Montgomery had never been cited in the suit and legal proceedings by virtue of which the property was sold.

That the appointment of a *curator ad hoc* to represent him while he was absent and within the confederate lines, was in violation of the authority of the United States and the proclamation of the President. p. 2.

That there was never a valid or legal seizure of the property made under the writ of execution. p. 15.

Answers were filed to the petition and supplement; and defendant also filed two peremptory exceptions to the relief prayed for, based on the judgments of the Supreme Court in the case No. 17,501; and the judgment in the monition proceedings, which were pleaded as *res adjudicata*.

These exceptions were heard by Judge Wood, who held that the judgment in 17,501 "is valid and binding, and that the proceedings and sale, founded on said judgment, having been homologated and confirmed by the judgment in monition, is full and conclusive proof that the sale was made according to law."

It is, therefore, "ordered and adjudged that the (two) exceptions taken jointly be sustained, and that the cause be dismissed at the plaintiff's cost."

Judgment signed 8 July, 1876, p. 34.

To this judgment the writ of error is sued out.

The plaintiff in error took three bills of exceptions, pp. 19, 20.

The first is as to the plaintiff's objection to the trial of the exceptions by the court, which was overruled.

The second and third are to the ruling of the court—that the judgment on the monition "had the effect in law of curing the alleged defect in Samory's title, resulting from a want of seizure, by the sheriff, of the property sold, and had the effect of *res judicata*, and operated as a bar against any claim of the plaintiff, based upon the alleged want of seizure of the property, and precluded the plaintiff from offering any evidence to support his allegation of the want of seizure.

It would seem no argument was necessary on the first exception, which complains that the court assumed the authority to decide independently of the jury the peremptory exceptions.

There is nothing in them which called for the intervention of a jury. They rest upon two judgments, which are properly certified; and no issue of fact was raised by the pleadings. No reply of *nul tiel record*. That such judgments were rendered was not denied. The only question between the parties related solely to their legal effect. This was, therefore, purely a question of law.

The maxim—"*ad questionem facti non-respondent judices—ad questionem legis non-respondent juratores*," is as applicable to the courts of Louisiana as to all others.

This is shown by the code of practice which provides that such exceptions must be pleaded in *limine litis*, that is to say, at the beginning of the suit, and before answering to the merits; for after plea, to the merits such exceptions cannot be heard.

Art. 344, 345.

The judgment in No. 17,501 is assailed on the ground that the absence of Montgomery did not justify the appointment of a *curator ad hoc.*

In his petition for an appeal to the Supreme Court from this judgment, Montgomery represents that he is a resident of New Orleans, and that during his temporary absence from the State it was rendered against him without having been cited as the law directs, and without there having been any *contestatio litis.*

In the Supreme Court no other question was raised than such as is stated in the petition for appeal. There was no allegation denying the validity of the debt secured by mortgage, as claimed by Samory.

The opinion of the Supreme Court (p. 28) fully discusses the ground of the appeal: "The only question (say the Court) is, was Montgomery, at the time this suit was instituted, an absentee in legal contemplation, to whom a *curator ad hoc* might be appointed, and contradictorily with whom a suit might be prosecuted and a valid judgment obtained against the absent person?" p. 29.

The court resolves in the affirmative and affirms the judgment.

This is purely a decision on a question of local law made by the highest judicial authority of the State, and is thus obligatory on the courts of the United States.

The ground set up in the petition that a *curator ad hoc* could not be legally appointed to represent Montgomery, because, in 1861, "he engaged in rebellion against the United States Government—joined the Louisiana guards and accompanied that military body to the State of Virginia, and remained in that portion of the Confederate States until June, 1865," in no wise impairs the validity of the judgment.

In *Ludlow* vs. *Ramsay*, 11 Wall., 581, it is held that the doctrine in *Dean* vs. *Nelson*, does not apply to a person who left the Union lines and voluntarily entered into rebellion. Such a person cannot complain of legal proceedings regularly prosecuted against him as an absentee.

University vs. *Finch*, 18 Wall., 108.

Whether the facts of this case distinguish it from those in the above decisions we need not discuss, for we maintain that the ground of Montgomery's absence raised the question whether by the laws of Louisiana such absence justified the appointment of the curator, and whether right or wrong a decision by the Supreme Court on those laws is conclusive.

The only remaining exception is as to the effect of the judgment on monition in curing the alleged want of a legal seizure.

As this is the pivotal question in the case we copy the munition act in its entirely as it appears in the revised statutes.

> Sec. 2370. The purchasers of property at sheriff's sales; those made by the authority of the court; those made by the syndics of insolvent estates, and finally those of any description which are made by the authority of justice, and all subsequent purchasers by a regular chain of title, may protect themselves from eviction of the property so purchased, or from any responsibility as possessors of the same, by pursuing the rules hereinafter prescribed.
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> Sec. 2371. It shall be the duty of the purchasers, if the purchase has been made within the limits of the city and parish of Orleans, to publish three times, or if the sale has been made out of the limits of the parish and city aforesaid, to publish the same for the space of time and in the manner required for advertising judicial proceedings, a monition calling on all persons who can set up any right to the property, in consequence of informality in the order, decree or judgment of the court, under which the sale was made, or any irregularity or

illegality in the appraisement and advertisement, in time and manner of sale, or for any defect whatsoever, to show cause within thirty days from the day the monition is first inserted in the public papers, why the sale so made should not be confirmed and homologated.

Sec. 2372. This monition shall state the judicial authority under which the sale took place, and shall also contain the same description of the property purchased as that given in the judicial conveyance to the buyer, and shall further declare the price at which the object was bought.

Sec. 2373. The judges of the respective courts from which the orders, decrees or judgments may have issued, and in virtue of which the sales ought to be homologated, which have been made, shall, on application of the buyer, grant this monition in the name of the State, and affix to it the seal of the court.

Sec. 2374. At the expiration of the thirty days, the party obtaining the monition may apply to the judge of the court, out of which the monition is issued, to confirm and homologate the sale, and it shall be the duty of the judge in case no cause is shown against the prayer for the monition, to homologate and confirm the judicial sale in question; *Provided always*, that before he does so confirm it, he shall be fully satisfied that the advertisements have been inserted in the newspapers, as already directed, and that the property has been correctly described, and the price at which it was purchased, truly paid; but in case opposition be made to the homologation, and it should appear that the sale is made contrary to law, it shall then be the duty of the judge to annul it, otherwise to confirm it, as in case no opposition was made.

Sec. 2375. The judgment of the court on the monition aforesaid shall be in itself conclusive evidence that the monition has been regularly made and duly advertised, nor shall any evidence be received thereafter to contradict the same, or to prove any irregularity in the proceeding.

Sec. 2376. The judgment of the court confirming and homologating the sale shall have the force of *res judicata*, and operate as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property sold, in consequence of all illegality or informality in the proceeding, whether before or after judgment; and the judgment of homologation shall in all cases be received and considered as full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced on the *interest* of parties duly represented.

SEC. 2377. Nothing herein contained shall be taken or understood so as to render valid any sale made in virtue of a judgment when the party cast was not duly cited to make defense; and in every case where minors are interested, they shall have their recourse on their tutors if they have improperly neglected to make opposition to the confirmation of the sale of their property.

SEC. 2378. Where no opposition is made to the confirmation of the sale, the cost of attending the proceeding shall be paid by the party who prays for the monition, and where opposition is made, the costs shall be borne by the party against whom judgment is rendered.

SEC. 2379. Nothing herein contained shall be construed or understood to authorize the purchaser at a judicial sale to refuse carrying the same into effect, or to delay the payment of the price for a greater space of time than is now allowed by law.

SEC. 2380. The provisions of the foregoing section shall be extended to tax sales, provided such sales shall have been made for the time within which, by law, the property could be redeemed before the monition is applied for.

Rev. Stat. La., 469.

Now let us apply these provisions, as described in section 2370.

Samory is "*a purchaser at a sheriff's sale.*" To "*protect himself from eviction of the property purchased, or from any responsibility as possessor of the same,*" he advertised, under the provisions of section 2,371, "calling on all persons who can set up any right to the property, in consequence of any informality in the order, decree or judgment of the court under which the sale was made, or any *irregularity* or *illegality* in the appraisement, advertisement, time and manner of sale, *or for any other defect whatever*," to show cause why the sale should not be "confirmed and homologated."

By section 2374 the judge out of whose court the monition is issued, where *no cause is shown* against the prayer for monition before he confirms the sale, is to be fully satisfied that the advertisements have been made, as the law directs, that the property has been correctly described, and that the price at which it was purchased was duly paid.

The section then further provides for the case where opposition is made to the homologation; when this occurs and it appears the "*sale was made contrary to law*, the judge is to annul it, otherwise to confirm it as in case no opposition is made."

Section 2375 makes the judgment in itself conclusive evidence of the regularity of the proceeding, to wit, that the monition has been properly made and *duly advertised.*

Section 2376 declares such a judgment to have the force of *res judicata*, and to operate as a *complete bar* against all persons, *whether of age or minors*, whether *present or absent*, who may thereafter claim the property in consequence of any *illegality or informality*, whether *before or after judgment.*

Strong and extensive as this is, the same section *ex industria* further provides, that this judgment "shall, in *all cases*, be received and considered as full and *conclusive proof* that the *sale was duly made according to law*, in virtue of a judgment or order regularly pronounced in the interest of parties duly represented."

The judgment on the monition now before us, recites the application for the monition, the record of the deed of sale, proof of the publication according to law, and the fact that there was no opposition.

The section just cited declares that this judgment is to be "received and considered as conclusive proof *that the sale was duly made according to law*."

The complaint made in this case is, that the sale was *not according to law*, inasmuch as there was no seizure.

What other reply could be made by the judge *a quo*, than that the statute itself makes the judgment conclusive proof that the sale *was made* according to law?

It will be seen that while this legislation is intended to protect purchasers at judicial sales, it is not unmindful of the rights of opposing claimants, for where no opposition is made, the judge is to be fully satisfied that the advertisement has been legally made, the property correctly described, and the price fully paid; when there is opposition, then any illegality in the sale is made the ground for annulling it.

The scope and reach of this statute is subject to one exception, and one only, to be found in section 2377, to wit: that the proceedings under this act shall not "render valid any sale made in virtue of a judgment when the party cast was not duly cited to make defence."

The judgment in monition was rendered on the 15 June, 1864, and Montgomery's appeal to the Supreme Court from the judgment in No. 17,501 was on 15 July, 1865.

There was no attempt made to attack the monition proceedings, for his learned counsel, W. H. Hunt, well understood that these were conclusive, provided Montgomery had been duly cited in No. 17,501.

It was therefore necessary to bring him within the category of Section 2377, and show that the "sale was made in virtue of a judgment where the party cast was not duly cited to make defense."

If successful in this, the judgment in monition became null; if otherwise, it was "full and conclusive proof that the sale was duly made according to law."

The judgment of the Supreme Court holding that he was duly cited, cut from under him the only ground upon which he could contest the validity of the sale.

"The *only question*" (say this Court) "that the judgment in monition leaves open, is whether the court that rendered the original judgment had jurisdiction of the person. *Jiter* vs. *Hewit*, 22 How., 363.

On the construction of these provisions it is not deemed necessary to do more than refer to the latest decision of the Supreme Court of the State, decided in 1872—*Willis* vs. *Nicholson*, 24 An., in an action to annul the sale. The grounds for annulment were—

1st. That the sheriff was enjoined from making the sale;

2d. That he was instructed by the plaintiff in execution not to sell;

3d. That he had no authority to sell less than he had seized;

4th. That there was no sufficient description and identification of the land adjudicated.

The court held that the *want of authority in the sheriff* to make the sale could not be set up in the face of a judgment in monition which is *res judicata.*

There was of the five judges a single dissentient, and his dissent serves to give point to the decision of the majority.

It is based on the proposition, that the monition law was only intended to cure *informalities.* As it cites all the cases relied on by counsel for plaintiff in error, we need make no other comment on them.

It is sufficient to say that in the case in hand—the alleged irregularity or illegality in the action of the sheriff, was of a less serious character than in the case cited.

In the one, he merely omits to pursue a single direction of the law; in the other, he acts in defiance of all law.

If, therefore, the greater include the less, then this decision of the Supreme Court of the State must be regarded as completely closing the present controversy.

We ask attention to the brief of our colleague, Mr. Miller, and submit that tne judgment of the Circuit Court should be affirmed.

P. PHILLIPS,
for Defendant in Error.